No. 11384

United States Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of REED and LANE, Plumbers, Heaters and Sheet Metal,

Appellants,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as THE RANCH, and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA,

Appellees.

Transcript of Record

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

ATTORNEYS OF RECORD

BAILEY E. BELL,

WARREN A. TAYLOR,

Fairbanks, Alaska,

Attorneys for Plaintiffs and Appellants.

CECIL H. CLEGG,

Fairbanks, Alaska,

Attorney for Defendants and Appellees.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5288

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of REED and LANE, plumbers, heaters and sheet metal,

Plaintiffs,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as THE RANCH and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA,

Defendants.

COMPLAINT

Comes now the above named plaintiffs and for their cause of action against the above named defendants and each of them, allege and state:

1.

That the plaintiffs above named are now and have been at all times herein mentioned co-partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, with an office and business in the Town of Fairbanks, Alaska.

2.

That the defendants, George Gilbertson and Harvey Gilbertson are the joint owners and partners

doing business as The Ranch near the Town of Fairbanks, Alaska.

3.

That the First National Bank of Fairbanks, Alaska, is a corporation organized under the National Banking Laws of the United States, with its principal place of business at Fairbanks, Alaska.

4.

Plaintiffs further allege that on or about the 7th day of November, 1944, the defendants, George Gilbertson and Harvey Gilbertson, joint owners [1*] and partners doing business as The Ranch, employed these plaintiffs to do certain plumbing, steam fitting and sheet metal work and to furnish certain materials to be used in the buildings and improvements situated upon the hereinafter described premises and property which improvements were then being constructed, remodeled and repaired and at the special instance and request of the two last named defendants, the plaintiffs did and furnished certain work and labor and certain material in the installation and finishing of the improvements and building on said property and that continuously from the commencement of said work and week by week and month by month, these plaintiffs expended and furnished labor, skill and material which were incorporated in the buildings, improvements and structures on the above described real estate; that all of said labor, skill and materials were incorporated in said structures.

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* Page numbering appearing at foot of page of original Reporter's Transcript.

5.

That these plaintiffs supplied the last item of work and material on the 23rd day of December, 1944; that they supplied work and material as aforesaid of the value of $2,107.24 on which the defendants are entitled to a credit for a return of materials and cash paid on account to the extent of $677.48 leaving a balance due these plaintiffs in the sum of $1,429.76 together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944.

6.

Plaintiffs further allege that all of said labor and materials were furnished and used in the betterment and finishing of the buildings and improvements located on the following described property, to-wit:

That piece or parcel of land described by metes and bounds as follows, to-wit: commencing at the northeast corner of the Homestead of August W. Bjerremark (Patent No. 929387) said corner being situate on the boundary line between sections Fourteen (14) and Fifteen (15), Township One (1) South, Range One (1) West of Fairbanks Meridian:

Then South 0° 64′ W 434.22 feet to corner Number Two (2); thence South 89° 56′ West 397.93 feet to corner Number Three (3); thence North 10° 52′ West 442.66 feet to corner Number Four (4); thence North 89° 56′ East 476.05 feet to corner Number One (1) the place of beginning. [2]

7.

Plaintiffs further allege that the work and labor was all done and materials all furnished and the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, accepted said job as finished and promised to pay therefor, but have failed, neglected and now refuse to pay.

8.

That the owners of the above described property are George Gilbertson and Harvey Gilbertson, two of the defendants above named.

9.

That at all times plaintiffs have claimed the benefit of the laws of Alaska relative to liens for labor performed and materials furnished on real estate and did on or about the 21st day of March, 1945, claim a lien upon said property by recording in the office of the Recording District wherein said property is situate and said work performed and materials furnished to-wit: The Fairbanks Recording District, a duly verified notice of contractors lien containing a true and correct account of said demand of plaintiffs, after deducting all just credits and offsets, describing said premises sufficiently for identification naming the owners thereof and claiming a contractors lien thereon, a copy of which said claim of lien is attached hereto, marked "Exhibit A" and by this reference made a part hereof.

10.

That no part of the money claimed in said lien as set out in plaintiffs "Exhibit A" has been paid, but the entire amount of $1,429.76 together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, is still due and owing.

11.

That the plaintiffs were compelled to and did pay the sum of $15.00 for legal services for preparing said lien and as the cost recording the same and that by reason of this suit, plaintiffs claim a reasonable attorneys fee for their attorney, for the foreclosure of the lien above set forth and that a reasonable attorneys fee is ten per cent (10%) of the amount involved herein or the sum of $142.97. [3]

12.

Plaintiffs further allege that they performed each and every material act necessary to fully and completely finish their contract and obligations on their part and there is nothing more to do except for the defendants to pay the plaintiffs the amount due thereon.

13.

Plaintiffs further allege that the First National Bank of Fairbanks, Alaska, claims some right, title lien or interest in and to the above described property, but that any lien it has is junior and inferior to the lien of these plaintiffs and that said Bank should be required to come into Court and set up such claim as it may have against this property or any part thereof.

Wherefore, plaintiffs pray judgment against the defendants and each of them as follows, to-wit:

(A) Against the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch for the sum of $1,429.76, together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, and for a further judgment in the sum of $15.00, the cost and expense in filing the lien above described and for an attorney's fee for plaintiffs attorney in the sum of $142.97 and for further judgment for the costs of this action.

(B) Judgment foreclosing plaintiffs lien against said real property together with all building and improvements thereon and ordering the sale thereof to satisfy said principal amount of $1,429.76 together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, and for the further sum of $15.00, the expense of filing the lien and for an attorney's fee for plaintiffs attorney in the sum of $142.97 and for the further judgment ordering that if the proceeds of such sale do not satisfy plaintiffs' claim in full, that a deficiency judgment be entered for the balance.

(C) For the further judgment decreeing said property and the whole title thereof subject to the plaintiffs' lien above prayed for and cutting off forever the interest of the defendants in and to said property herein above described and decreeing that the lien or interest, if any, of the First National

Bank of Fairbanks, Alaska, to be junior and inferior to the lien of these plaintiffs. [4]

(D) For such other and further relief as the Court shall deem just and proper in the premises.

BAILEY E. BELL,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Henry E. Reed, being first duly sworn, on oath, deposes and says: That he is one of the partners of the above firm which are the plaintiffs above named; that he has read the above complaint and knows the contents thereof and that the allegations therein are true, as he verily believes.

HENRY E. REED.

Subscribed and sworn to before me this 30th day of March, 1945.

[Seal] BAILEY E. BELL,
Notary Public in and for Alaska. My commission expires 1/28/49. [5]

EXHIBIT "A"

NOTICE OF CONTRACTORS LIEN

United States of America, Territory of Alaska,
Fourth Division, Fairbanks Precinct

[Title of Cause.]

Notice is hereby given that Joseph Lane, Henry E. Reed and Stanley Smith, doing business as Reed and Lane, plumbers, heaters and sheet metal, claim a lien on the hereinafter described real estate and improvemnts thereon against George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch who are the owners of record of the property hereinafter described property.

That piece or parcel of land described by metes and bounds as follows, to-wit: commencing at the northeast corner of the Homestead of August W. Bjerremark (Patent No. 929387) said corner being situate on the boundary line between sections Fourteen (14) and Fifteen (15), Township One (1) South, Range One (1) West of Fairbanks Meridian;

Thence south 0° 04′ W 434.22 feet to corner Number Two (2); thence South 89° 56′ West 397.93 feet to corner Number Three (3); thence North 10° 52′ West 442.66 to corner Number Four (4); thence North 89° 56′ East 476.05 feet to corner Number One (1) the place of beginning.

This claim of lien is based upon the following facts; the defendants herein employed these claim-

ants to do certain plumbing, steam fitting and sheet metal work and to furnish certain materials in plumbing, heating and sheet metal finishing of the building and improvements situated upon the above described premises and property which improvements were then being built, constructed and remodeled and at the special instance and request of the above named defendants, the claimants did and furnishd certain work and labor and certain material in the installation and finishing of the improvements on said [6] property and that continuously from the commencement of said work and week by week and month by month, the claimants expended and furnished labor, skill and material upon, and which were incorporated in the building, improvement and structures on the above described real estate; that all of said labor, skill and materials were incorporated in said structures; that claimants supplied the last item of work and materials on the 23rd day of December, 1944; that claimants supplied work and materials as aforesaid of the value of $2,107.24 and that there has been credits on said indebtedness which includes a return of material and cash paid on account to the extent of $677.48, leaving a balance due of $1,429.76, together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944.

After deducting all just credits and offsets, the above named claimants now claim a lien against the defendants and on the property above described for the sum of $1,429.76 together with interest there-

on at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, until paid.

That the name of the owner or reputed owner of said property is George Gilbertson and Harvey Gilbertson, which has been the situation at all times above mentioned; that ninety (90) days have not elapsed since claimants last rendition of service and delivery of materials to the defendants as aforesaid.

Joseph Lane, Henry E. Reed and Stanley Smith, partners doing busines under the firm name and style of Reed & Lane, plumbers, heaters and sheet metal.

By HENRY E. REED,
One of the Partners.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Henry E. Reed, being first duly sworn, on oath, deposes and says: That he is one of the partners of the above firm which are the claimants above named; that he has read the above notice of claim of lien; knows the contents thereof and that the same is true, as he verily believes.

HENRY E. REED.

Subscribed and sworn to before be this 21st day of March, 1945.

BAILEY E. BELL,
Notary Public in and for Alaska. My commission expires 1/28/1949.

[Endorsed]: Filed March 31, 1945. [7]

[Title of District Court and Cause.]

DEMURRER

Come now George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, defendants above named, and demur to the Complaint on file herein upon the ground and for the reason that the same fails to state facts sufficient to constitute a cause of action against them, or either of them.

CECIL H. CLEGG,

Attorney for Defendants George Gilbertson and Harvey Gilbertson.

(Acknowledgment of Service.)

[Endorsed]: Filed May 1, 1945. [8]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Come now the above named plaintiffs and for their cause of action against the above named defendants and each of them, allege and state:

1.

That the plaintiffs above named are now and have been at all times herein mentioned co-partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, with an office and business in the Town of Fairbanks, Alaska.

2.

That the defendants, George Gilbertson and Harvey Gilbertson are the joint owners and partners doing business as The Ranch near the Town of Fairbanks, Alaska.

3.

That the First National Bank of Fairbanks, Alaska, is a corporation organized under the National Banking Laws of the United States, with its principal place of business at Fairbanks, Alaska.

4.

Plaintiffs further allege that on or about the 7th day of November, 1944, the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, employed these plaintiffs to do certain plumbing, steam fitting and sheet metal work and to furnish certain [9] materials to be used in the buildings and improvements situated upon the hereinafter described premises and property which improvements were then being constructed, remodeled and repaired and the defendants Gorge Gilbertson and Harvey Gilbertson orally agreed to pay therefor, the customary and reasonable price for the material furnished and the labor furnished and performed. At the special instance and request of the two last named defendants, the plaintiffs did and furnished certain work and labor and certain material in the installation and finishing of the improvements and building on said property and that continuously from the commencement of said work and week by

week and month by month, these plaintiffs expended and furnished labor, skill and material which were incorporated in the buildings, improvements and structures on the above described real estate; that all of said labor, skill and materials were incorporated in said structures.

5.

That these plaintiffs supplied the last item of work and material on the 23rd day of December, 1944; that they supplied work and material as aforesaid of the reasonable and customary value of $2,107.24, on which the defendants are entitled to a credit for a return of materials and cash paid on account to the extent of $677.46, leaving a balance due these plaintiffs in the sum of $1,429.76, together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944.

6.

Plaintiffs further allege that all of said labor and materials were furnished and used in the betterment and finishing of the buildings and improvements located on the following described property, to-wit:

That piece or parcel of land described by metes and bounds as follows, to-wit: commencing at the northeast corner of the Homestead of August W. Bjerremark (Patent No. 929387) said corner being situate on the boundary line between sections Fourteen (14) and Fifteen (15), Township One (1)

South, Range One (1) West of Fairbanks, Meridian;

Thence South 0° 64′ W 434.22 feet to corner Number Two (2); thence South 89° 56′ West 397.93 feet to corner Number Three (3); thence North 10° 52′ West 442.66 to corner Number Four (4); thence North 89° 56′ East 476.05 feet to corner Number One (1) the place of beginning. All of said property being situated on the Richardson Highway near the town of Fairbanks, Alaska, in the Fourth Judicial Division. [10]

7.

Plaintiffs further allege that the work and labor was all done and materials all furnished in compliance with said oral contract, and the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, accepted said job as finished and promised to pay therefor, the sum herein sued for, but have failed, neglected and now refuse to pay.

8.

That the owners of the above described property are George Gilbertson and Harvey Gilbertson, two of the defendants above named.

9.

That at all times plaintiffs have claimed the benefit of the laws of Alaska relative to liens for labor. performed and materials furnished on real estate and did on or about the 21st day of March, 1945, claim a lien upon said property by recording in

the office of the Recording District wherein said property is situate and said work performed and materials furnished, to-wit: The Fairbanks Recording District, in the Territory of Alaska, a duly verified notice of contractor's lien, containing a true and correct account of said demand of plaintiffs, after deducting all just credits and offsets, describing said premises sufficiently for identification naming the owners thereof and claiming a contractors lien thereon, a copy of which said claim of lien is attached hereto, (marked "Exhibit A") and by this reference made a part hereof.

10.

That no part of the money claimed in said lien as set out in plaintiffs' "Exhibit A" has been paid but the entire amount of $1,429.76 together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, is still due and owing.

11.

That the plaintiffs were compelled to and did pay the sum of $15.00 for legal services for preparing said lien and as the cost of recording the same and that by reason of this suit, plaintiffs claim a reasonable attorneys fee for their attorney, for the foreclosure of the lien above set forth and that a reasonable attorneys fee is ten per cent (10%) of the amount involved herein or the sum of $142.97. [11]

12.

Plaintiffs further allege that they performed

each and every material act necessary to fully and completely finish their contract and obligations on their part and there is nothing more to do except for the defendants to pay the plaintiffs the amount due thereon.

13.

Plaintiffs further allege that the First National Bank of Fairbanks, Alaska, claim some right, title lien or interest in and to the above described property, but that any lien it has is junior and inferior to the lien of these plaintiffs and that said Bank should be required to come into Court and set up such claim as it may have against this property or any part thereof.

Wherefore, plaintiffs pray judgment against the defendants and each of them as follows, to-wit:

A. Against the defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch for the sum of $1,429.76, together with interest thereon at the rate of six per cent (6%) per annum from the 23rd day of December, 1944, and for a further judgment in the sum of $15.00, the cost and expense in filing the lien above described and for an attorney's fee for plaintiffs attorney in the sum of $142.97, and for further judgment for the costs of this action.

B. Judgment foreclosing plaintiffs' lien against said real property together with all building and improvements thereon and ordering the sale thereof to satisfy said principal amount of $1,429.76 together with interest thereon at the rate of six per

cent (6%) per annum from the 23rd day of December, 1944, and for the further sum of $15.00, the expense of filing the lien and for an attorney's fee for plaintiffs' attorney in the sum of $142.97 and for the further judgment ordering that if the proceeds of such sale do not satisfy plaintiffs' claim in full, that deficiency judgment be entered for the balance.

C. For the further judgment decreeing said property and the whole title thereof subject to the plaintiffs lien above prayed for and cutting off [12] forever the interest of the defendant in and to said property herein above described and decreeing that the lien or interest, if any, of the First National Bank of Fairbanks, Alaska, to be junior and inferior to the lien of these plaintiffs.

D. For such other and further relief as the Court shall deem just and proper in the premises.

BAILEY E. BELL,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Henry E. Reed, being first duly sworn, on oath, deposes and says: That he is one of the partners of the above firm which are the plaintiffs above named; that he has read the above complaint and knows the contents thereof and that the allegations therein are true, as he verily believes.

HENRY E. REED.

Subscribed and sworn to before me this 9th day of May, 1945.

[Seal] BAILEY E. BELL,
Notary Public in and for Alaska. My commission expires 1/28/49.

(Acknowledgment of Service.)

(Here follows Exhibit "A", which is similar to Exhibit "A" attached to Complaint, and set out in full at page 9.)

[Endorsed]: Filed May 9, 1945. [13]

[Title of District Court and Cause.]

DEMURRER

Come now George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, defendants above named, and demur to the Amended Complaint of plaintiffs on file here-

in upon the ground and for the reason that it appears from the face of said Amended Complaint that the same fails to state facts sufficient to constitute a cause of action against said defendants or either of them.

CECIL H. CLEGG,

Attorney for Defendants George Gilbertson and Harvey Gilbertson.

(Acknowledgment of Service.)

[Endorsed]: Filed May 14, 1945. [16]

[Title of District Court and Cause.]

DEMURRER

Come now George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, defendants above named, and demur to the Amended Complaint herein as further amended by interlineation with leave of said Court granted on May 18, 1945, upon the ground and for the reason that it appears from the face of said Amended Complaint as further amended by interlineation that the same fails to state facts sufficient to constitute a cause of action against these defendants.

CECIL H. CLEGG,

Attorney for Defendants George Gilbertson and Harvey Gilbertson.

(Acknowledgment of Service.)

[Endorsed]: Filed May 23, 1945. [17]

[Title of Cause.]

ORDER

The plaintiffs were represented by Bailey E. Bell; the defendants by Cecil H. Clegg.

Respective counsel had argument on the defendants' Demurrer to the Amended Complaint.

It was Ordered that the Demurrer be sustained and that the plaintiff be permitted to amend by interlineation as follows, viz: "All of said property being situated on the Richardson Highway near the Town of Fairbanks, Alaska, in the Fourth Judicial Division." to be written at the bottom of Page 2 of the Amended Complaint; in the sixth line of Paragraph 9 after the word "District" the words "in the Territory of Alaska", said interlineations and additions to be done by the Clerk forthwith; that the defendants have ten (10) days to answer.

Entered in Court Journal No. 32, Page 183.
May 25, 1945. [18]

[Title of District Court and Cause.]

ANSWER

Come now George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, defendants above named, and, for answer to plaintiff's Amended Complaint admits, denies, and alleges as follows:

I.

Answering paragraph 4 of said Amended Complaint, defendants admit they employed plaintiffs

to do certain plumbing, steam fitting, and sheet metal work, and to furnish certain materials, including efficient heating plant, to be used in the buildings and improvements situated upon the real property described in said Amended Complaint, for the reasonable price and of the value customarily paid in the Town of Fairbanks, Alaska, for such work and materials, and defendants deny each and every other allegation contained in said paragraph 4. Defendants further allege that plaintiffs were wholly unskilled and inexperienced in the work for which they were employed and were wholly unable to perform the same or to supply the materials for such work, and did not perform the work agreed upon and did not furnish all the materials necessary therefor; that any labor expended upon or materials furnished by plaintiffs on said building at the time and place alleged were a detriment [19] thereto and resulted in the virtual destruction of said building by smearing the interior thereof and all property of defendants therein with oil, smoke, smudge, dirt, and pollution from two separate oil burners which were afterwards discarded by defendants and substitution eventually made for them by defendants at their own expense.

II.

Answering paragraph 5, these defendants admit that the last item of work and materials supplied by plaintiffs was so supplied on the 16th day of December, 1944, and defendants deny all other allegations and each thereof contained in said para-

graph 5, except the allegation that defendants were and are entitled to a credit from plaintiffs in the sum of $677.46.

III.

Answering paragraph 6, defendants deny that all of the labor and materials furnished by plaintiffs to defendants were used in the betterment and finishing of the buildings, or any of them, located on the premises described in said paragraph 6.

IV.

Answering paragraph 7, defendants deny that the work and labor done and materials furnished by plaintiffs to defendants were done and furnished in compliance with any oral contract between plaintiffs and defendants and defendants allege that the said contract contemplated a good, sound, first class job on the part of plaintiffs and plaintiffs wholly failed to perform their contract in this regard, as heretofore alleged in paragraph I hereof. Defendants further deny that said defendants at any time accepted said job as finished and deny that they then, or at any time, promised to pay therefor the sum herein sued for as the just compensation of said plaintiffs for said work and materials done or furnished by plaintiffs.

V.

Defendants deny each and every allegation contained in paragraphs 9, 10, 11, 12 and 13, and the whole of each of said paragraphs. [20]

Wherefore, having fully answered said Amended Complaint, these answering defendants pray that

plaintiffs take nothing by this action, and that defendants have and recover their costs and disbursements herein.

CECIL H. CLEGG,
Attorney for Defendants George Gilbertson and Harvey Gilbertson.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Harvey Gilbertson, being first duly sworn, on oath deposes and says: I am one of the defendants in the above entitled action; that I have read the foregoing Answer, know the contents thereof, and the same is true as I verily believe.

HARVEY S. GILBERTSON.

Subscribed and sworn to before me on this 4th day of June, 1945.

[Seal] CECIL H. CLEGG,
Notary Public for Alaska.

My commission expires April 30th, 1946.

(Acknowledgment of Service.)

[Endorsed]: Filed June 4, 1945. [21]

[Title of District Court and Cause.]

REPLY

Come now the above named plaintiffs and for reply to the answer of the defendants George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and allege and state:

1.

They deny that they were unskilled and unexperienced in the work for which they were employed to do. Deny that they were unable to furnish the materials for such work. Deny that they did not perform the work agreed upon. Deny that the labor and material furnished and performed were a detriment to the defendant. Deny that they smeared the interior of said building in any way, and allege the facts to be that they are each experienced in their line of work and did the work in a workmanlike manner, and deny all affirmative allegations of defense set out in said answer.

Wherefore, having fully replied to the answer of the defendants above named, pray that they may recover as in the amended complaint prayed for.

BAILEY E. BELL,
Attorney for Plaintiffs. [22]

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Henry E. Reed, being first duly sworn, on oath, deposes and says: That he is one of the partners of

the above firm which are the plaintiffs above named; that he has read the above reply and knows the contents thereof and that the allegations therein are true, as he verily believes.

HENRY E. REED.

Subscribed and sworn to before me this 7th day of July, 1945.

[Seal] BAILEY E. BELL,
Notary Public in and for Alaska. My commission expires 1/28/49.

(Acknowledgment of Service.)

[Endorsed]: Filed July 13, 1945. [23]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered That the above entitled cause came on regularly for trial on the 4th day of February, 1946, at the hour of ten o'clock a.m., at which time said cause had been theretofore regularly set for trial, said day being one of the Court days of the General March, 1945, Term of the above entitled Court. Plaintiffs Joseph Lane and Henry E. Reed appeared in person and said plaintiffs were represented by their attorney, Bailey E. Bell. The Defendants George Gilbertson and Harvey Gilbertson appeared in person and by their attorney, Cecil H. Clegg. The Defendant, The First National Bank

of Fairbanks, Alaska, did not appear at said trial. Plaintiffs and defendants George Gilbertson and Harvey Gilbertson announced readiness for trial and the same was thereupon proceeded with. Certain oral testimony and documentary proofs were submitted by plaintiffs in their behalf, who then rested. Said defendants submitted oral testimony and documentary proofs in their behalf and then rested. Whereupon said Court, having considered the proofs and evidence in said cause and the arguments of counsel, and being fully advised in the premises, does now make and enter the following [24]

FINDINGS OF FACT

I.

That between the 16th day of August, 1944, and the 20th day of December, 1944, inclusive, plaintiffs and defendants, George Gilbertson and Harvey Gilbertson, entered into an oral agreement whereby plaintiffs agreed to furnish an adequate first-class heating system for the building of said defendants known as "The Ranch," upon the land described in the Amended Complaint herein, and to install the same in said building, and that said defendants agreed to pay therefor the reasonable and customary value of the same.

II.

That between the 1st day of October, 1944, and the 16th day of December, 1944, plaintiffs installed an alleged heating system in said building; that the same was not adequate to heat said building and

was not a first-class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of $195.00.

III.

That said defendants detached from said building and premises, and refused to keep, the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and for which plaintiffs had charged said defendants the sums of $175.00 and $100.00, respectively; that said defendants tendered said boiler and oil burner, as personal property, back to plaintiffs, and the same are now their property.

IV.

That between the 16th day of August, 1944, and the 20th day of December, 1944, both dates inclusive, plaintiffs and said defendants entered into an oral contract whereby plaintiffs agreed to furnish and install certain plumbing and sheet metal in said Ranch building, and said defendants agreed to pay therefor the reasonable value thereof. [25]

V.

That, pursuant to said last mentioned agreement, plaintiffs furnished and installed said plumbing and sheet metal in said Ranch Building, the last material being furnished and the last labor in the installation of the same being done upon the 20th day of December, 1944.

VI.

That the reasonable value of said plumbing and

sheet metal and the installation of the same was as shown upon plaintiffs' Exhibit A introduced in evidence herein, to-wit, $326.79, composed of the following:

Plumbing	$ 57.00
Well point	8.00
Xzit	2.00
Spray pump	1.00
2-inch coupling	1.10
Fittings	13.30
Ballance on electric range	50.00
Fittings	3.15
Sheet metal	191.24

VII.

That plaintiffs' lien claim in this action having been filed for record upon the 21st day of March, 1945, was filed more than ninety days after the last work or last material was furnished under said contracts, and, therefore, was filed after the time allowed by law for filing such a lien claim.

VIII.

That upon the 24th day of December, 1944, plaintiffs made a service call to adjust or repair the oil burner at said Ranch building and made a charge of $3.00 therefor; that said charge was not pursuant to the above mentioned contracts, or either of them, and formed no part of the performance of either of said contracts, and no lien claim was filed for said $3.00 charge.

IX.

That said defendants paid plaintiffs on said con-

tracts or were, by agreement of plaintiffs, allowed the following credits for the following matters, to-wit: [26]

$250.00	cash paid;
250.00	for bathroom set of defendants delivered to plaintiffs;
50.00	for defendants' hand-fired boiler delivered to plaintiffs; and
60.00	for defendants' material purchased from Paul Palfy and delivered to Plaintiffs.

Total . . . $610.00

And from the foregoing Findings of Fact, the Court does now make and enter the following

CONCLUSIONS OF LAW

I.

That plaintiffs have no lien upon said Ranch building or premises described in the amended Complaint herein, and that they take nothing by this action.

II.

That said defendants have paid in full all sums owing to plaintiffs upon said contracts.

III.

That said boiler and oil burner which were detached from said heating system by said defendants are the property of plaintiffs.

IV.

That said defendants are entitled to recover from

plaintiffs their costs and disbursements in this action.

V.

That judgment and decree may be entered accordingly.

Done at Fairbanks, Alaska, this 18th day of February, 1946.

HARRY E. PRATT,
District Judge.

Entered in Court Journal No. 33, Page 237, Feb. 18, 1946.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 18, 1946. [27]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL

Comes now the plaintiffs in the above-entitled cause, and moves the Court to set aside the judgment, findings and decision rendered herein on the 14th day of February, 1946, and to grant a new trial for the following reasons, which materially affect the rights of these plaintiffs:

1.

That the Court erred in sustaining the defendants' objections to competent questions, thereby preventing the introduction of competent evidence.

2.

That the Court erred in sustaining objections to identification and exhibits offered on behalf of the plaintiffs, which were competent, material and relevant, and should have been admitted in evidence.

3.

That the Court erred in refusing the numerous offers to prove competent, material and relevant evidence.

4.

That the Court erred in sustaining objections to the offers in evidence of the invoice issued by the plaintiffs, the original of which were delievered to the defendants and the exact carbon copy kept by the plaintiffs as a part of their regular bookkeeping record of the account sued on herein. [28]

5.

That the Court erred in sustaining objections to the introduction in evidence of the original time cards; same being the original and first entry of record of the account sued for herein, and being a part of the bookkeeping system used by the plaintiffs in their place of business at Fairbanks, Alaska, affecting the account sued for herein.

6.

The Court erred in sustaining defendants objections to questions which were competent, material and relevant, and thereby prevented these plaintiffs from making part of their proof of the allegations in the complaint.

7.

The Court erred in finding that the plaintiffs and defendants entered into an oral agreement, whereby plaintiffs agreed to furnish an adequate first-class heating system for defendants' building, known as "The Ranch," for the reason that there were no competent evidence to base such findings on, and was contrary to the great weight of the evidence.

8.

That the Court erred in finding that the plaintiffs did install an alleged heating system in said building; that the same was not adequate to heat the said building and was not a first-class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of $195.00.

9.

The Court further erred in finding that defendants detached from said building and premises and refused to keep the same the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and charged defendants therefor the sums of $175.00 and $100.00, respectively; that the defendants tendered said boiler and burner, as personal property, back to plaintiffs, and the same is now their property.

10.

The Court further erred in finding that the plaintiffs' lien claim in this action, having been filed for

record upon the 21st day of March, 1945, was filed more than 90 days after the last work or last material was furnished under said contracts and, therefore, was filed after the time allowed by law for filing such a lien claim. [29]

11.

The Court further erred in finding that upon the 24th day of December, 1944, the plaintiffs made a service call to adjust or repair the oil burner at said Ranch and made a charge of $3.00 therefor; that the same was not pursuant to the above-mentioned contracts or either of them and formed no part of the performance of either of said contracts, and no lien claim was filed for said $3.00 charge.

12.

The Court further erred in the conclusions of law, number 1 to-wit: That plaintiffs have no lien upon said Ranch or premises.

13.

That the Court erred in conclusion of law number 2 to-wit: That the defendants have paid in full all sums owing the plaintifffs upon said contracts.

14.

The Court erred in conclusion of law number 3 to-wit: That the defendants are entitled to recover their costs and disbursements in this action.

15.

That the Court erred in the conclusion of law number 4 to-wit: That said boiler and oil burner

which were detached from said heating system are the property of the plaintiffs.

16.

The Court erred in denying the plaintiffs any recovery herein for the reason that there were no competent evidence upon which the Court could base such findings and conclusions of law set forth, and to said findings of facts were against the clear weight of the evidence and against the law controlling in this case.

17.

Plaintiffs therefore move that the Court grant a new trial in the above-entitled cause.

BAILEY E. BELL,
Attorney for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 16, 1946. [30]

[Title of District Court and Cause]

AMENDED MOTION FOR A NEW TRIAL

Comes now the plaintiffs in the above-entitled cause, and moves the Court to set aside the judgment, findings and decision rendered herein on the 18th day of February, 1946, and to grant a new trial for the following reasons, which materially affect the rights of these plaintiffs;

1.

That the Court erred in sustaining the defendants' objections to competent questions, thereby preventing the introduction of competent evidence.

2.

That the Court erred in sustaining objections to identification and exhibits offered on behalf of the plaintiffs, which were competent, material and relevant, and should have been admitted in evidence.

3.

That the Court erred in refusing the numerous offers to prove competent, material and relevant evidence.

4.

That the Court erred in sustaining objections to the offers in evidence of the invoice issued by the plaintiffs, the original of which were delivered to the defendants and the exact carbon copy kept by the plaintiffs as a part of their regular bookkeeping record of the account sued on herein. [31]

5.

That the Court erred in sustaining objections to the introduction in evidence of the original time cards; same being the original and first entry of record of the account sued for herein, and being a part of the bookkeeping system used by the plaintiffs in their place of business at Fairbanks, Alaska affecting the account sued for herein.

6.

The Court erred in sustaining defendants objections to questions which were competent, material and relevant, and thereby prevented these plaintiffs from making part of their proof of the allegations in the complaint.

7.

The Court erred in finding that the plaintiffs and defendants entered into an oral agreement, whereby plaintiffs agreed to furnish an adequate first-class heating system for defendants' building, known as "The Ranch," for the reason that there were no competent evidence to base such findings on, and was contrary to the great weight of the evidence.

8.

That the Court erred in finding that the plaintiffs did install an alleged heating system in said building; that the same was not adequate to heat the said building and was not a first-class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of $195.00.

9.

The Court further erred in finding that defendants detached from said building and premises and refused to keep the same the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and charged defendants therefor the sums of $175.00 and $100.00, respectively; that the defendants tendered said boiler and burner, as personal property, back to plaintiffs, and the

same is now their property. That such finding is not based upon sufficient competent evidence and is against the great weight thereof.

10.

The Court further erred in finding that the plaintiffs' lien claim in this action, having been filed for record upon the 21st day of March, 1945, [32] was filed more than 90 days after the last work or last material was furnished under said contracts and, therefore, was filed after the time allowed by law for filing such a lien claim.

11.

The Court further erred in finding that upon the 24th day of December, 1944, the plaintiffs made a service call to adjust or repair the oil burner at said Ranch and made a charge of $3.00 therefor; that the same was not pursuant to the above-mentioned contracts or either of them and formed no part of the performance of either of said contracts, and no lien claim was filed for said $3.00 charge; that said finding was contrary to the great weight of the evidence and not based upon sufficient competent evidence.

12.

The Court further erred in the conclusions of law, number 1 to-wit: That plaintiffs have no lien upon said Ranch or premises.

13.

That the Court erred in conclusion of law number 2 to-wit: That the defendants have paid in full all sums owing the plaintiffs upon said contracts.

14.

The Court erred in conclusion of law number 3 to-wit: That said boiler and oil burner which were detached from said heating system are the property of the plaintiffs.

15.

That the Court erred in the conclusion of law number 4 to-wit: That the defendants are entitled to recover their costs and disbursements in this action.

16.

The Court erred in denying the plaintiffs any recovery herein for the reason that there were no competent evidence upon which the Court could base such findings and conclusions of law set forth, and to said findings of facts were against the clear weight of the evidence and against the law controlling in this case.

17.

Plaintiffs therefore move that the Court grant a new trial in the above-entitled cause.

/s/ BAILEY E. BELL,
Attorney for Plaintiffs. [33]

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 21, 1946. [34]

[Title of Cause.]

ORDER

This being the time set for the arguments on the Motion for a New Trial in this cause, Cecil H. Clegg, counsel for the defendants, being present and Bailey E. Bell, counsel for the plaintiffs, not being present, and the Court having considered the plaintiffs' Motion for a New Trial and being fully advised in the premises, it was Ordered that the motion be denied.

Entered in Court Journal No. 33 Page 299. Mar. 15, 1946. [35]

In the District Court for the Territory of Alaska, Fourth Division

No. 5288.

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of REED and LANE, plumbers, heaters and sheet metal,

Plaintiffs,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as THE RANCH and The First National Bank of Fairbanks, Alaska,

Defendants,

JUDGMENT

Be is Remembered That the above entitled cause came on regularly for trial on the 4th day of

February, 1946, at the hour of ten o'clock, a.m., at which time said cause had been therefore regularly set for trial, said day being one of the Court days of the General March, 1945, Term of the above entitled Court. Plaintiffs Joseph Lane, and Henry E. Reed appeared in person, and said plaintiffs were represented by their attorney, Bailey E. Bell. The defendants George Gilbertson and Harvey Gilbertson appeared in person and by their attorney, Cecil H. Clegg. The defendant, the First National Bank of Fairbanks, Alaska, did not appear in said action. Plaintiffs and defendants announced readiness for trial and the same was thereupon proceeded with. Certain oral testimony and documentary proofs were submitted by plaintiffs in their behalf, who then rested. Said defendants submitted oral testimony and documentary proofs in their behalf and then rested. Whereupon said Court, having considered the proofs and evidence in said cause and the arguments of counsel, and having heretofore made, filed, and entered herein its Findings of Fact and Conclusions of Law, and being fully advised in the premises, [36]

Now, Therefore, By virtue of the law and the premises,

It Is Hereby Ordered and Adjudged That the plaintiffs above named are not entitled to a lien upon the premises of defendants George Gilbertson and Harvey Gilbertson known as "The Ranch," described in plaintiffs' Amended Complaint herein, and that said plaintiffs take nothing by this action.

It Is Further Ordered, Adjudged, and Decreed That said defendants, George Gilbertson and Harvey Gilbertson, have paid in full all sums owing to plaintiffs upon the contracts set forth in plaintiffs' said Amended Complaint herein, and that said defendants have and recover of and from said plaintiffs above named their costs and disbursements herein, taxed by the Clerk of this Court at the sum of $47.00, and that execution may issue therefor.

It Is Further Ordered, Adjudged, and Decreed That the plaintiffs above named are entitled to the immediate possession of the boiler and oil burner installed by them in the premises of said defendants known as "The Ranch," described in plaintiffs' said Amended Complaint.

Done in Open Court at Fairbanks, Alaska, this 15th day of March, 1946.

HARRY E. PRATT,
District Judge.

Entered in Court Journal No. 33, Page 300. Mar. 15, 1946.

(Acknowledgment of Service.)

[Endorsed]: Filed Mar. 15, 1946. [37]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES OF AMERICA.

Notice is hereby given that Joseph Lane and Henry Reed the sole owners and doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, the Plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit of the United States of America, from the final judgment entered in the above entitled action, and from the order overruling their motions for a new trial entered in this action on the 15th day of March, 1946, and as grounds of appeal allege that the Court erred as follows:

I.

The Court erred in overruling plaintiffs objections to questions which permitted evidence to be introduced that was incompetent, irrelevant, immaterial and prejudicial.

II.

The Court erred in sustaining objections to plaintiffs questions that were competent, relevant and material, thereby preventing plaintiffs from making proof that was admissible.

III.

The Court erred in refusing plaintiffs offers to prove competent [38] material and relevant matter.

IV.

That the judgment and findings of facts are contrary to the evidence; contrary to the law affecting this case, and against the clear weight of the evidence and the Court erred therein.

V.

The Court erred in overruling the motion for a new trial filed herein.

VI.

Errors of law occurring at the trial on the part of the Court, and excepted to by plaintiffs.

VII.

The Court erred in excluding certain identifications offered in evidence.

BAILEY E. BELL,
Attorney for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed Mar. 25, 1946. [39]

PETITION FOR ALLOWANCE OF APPEAL

The above named Plaintiffs, considering themselves aggrieved by the Judgment of this Court made and entered herein on the 15th day of March, 1946, and the orders of the Court as set out in the assignment of errors, said judgment being in favor of the Defendant and the judgment overruling the Plaintiff's motion for a new trial and the amended

motion for a new trial, which order overruling said motions was on the 15th day of March, 1946, and from the final judgment denying plaintiffs any recovery and entering judgment for the defendant against the plaintiffs and for all costs.

The Plaintiffs having given due notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit Court of the United States for the reasons specified and set forth in the [223] Assignment of Errors and the Notice of Appeal filed herein do respectfully pray that their said appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said judgment was made and entered be duly authenticated by the Clerk of this Court and sent to the United States Circuit Court of Appeals for the Ninth Circuit of the United States at San Francisco, California, and these said plaintiffs do further pray that said judgment aforementioned be corrected, set aside, reversed, a new trial ordered, and a proper judgment entered for the Plaintiffs herein, and that the Court fix the amount of appeal bond to be filed herein.

Dated at Fairbanks, Alaska, this 4th day of April 1946.

/s/ BAILEY E. BELL,
Attorney for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed April 5, 1946. [224]

[Title of District Court and Cause]

ASSIGNMENT OF ERRORS

Comes Now the above named Plaintiffs and for assignment of errors allege and state:

I.

That the Court erred in sustaining the Defendant's demurrer on May 4, 1945.

II.

That the Court erred in sustaining the demurrer to the Plaintiff's Complaint on the 18th day of May, 1945.

III.

That the Court erred in sustaining the demurrer to the Plaintiff's amended complaint on May 25, 1945.

IV.

That the Court erred in excluding the charge tickets [225] the same being the original entries in a part of the bookkeeping system of the Plaintiff as shown as follows, to-wit:

Testimony of Joseph Lane, Transcript Page four (4) as follows:

There was some errors in the bill, and we had made some mistakes in the bill, so Mr. Gilbertson

and I went over it, and there was some very glaring error in there; and we went over the bill and went over all the materials out there and changed the bill, and I thought that Mr. Gilbertson and I had reached an agreement. At least, when we left each other, why everything was in good shape, so it looked like he was satisfied and so was we.

Q. Did you have anything with you in the way of tickets, time and material tickets with you at the time you went over this bill?

A. Yes we had these tickets here.

Q. Now were those tickets all gone over with Mr. Gilbertson? A. Yes, that's right.

Q. And are those tickets now in the same condition they were at that time?

A. Yes, they are.

Q. Now, what are those tickets? Are they part of the regular records you keep, or the bookkeeping system at your place?

A. Yes, they are part of our time-keeping system. Each man makes them out every night.

Q. Are those the original and first entries made?

A. Yes, that's right.

Mr. Bell: I ask that they be marked as [226] Plaintiff's Identification No. 1. (Time tickets were marked Plaintiff's Identification No. 1 by the clerk of the Court.)

Q. Mr. Lane, when you and Mr. Gilbertson were together and discussing this, did you make some

changes and make some concessions to him there?

A. Yes, that's right.

Q. Will you tell the court what some of those changes were?

A. Well, Mr. Gilbertson had returned some material to us, and we came to an agreement there as to the price of that material. At first he hadn't been allowed enough on the material. There was an error in that, so in talking it over we came to a settlement on the material. I believe the amount was $60.00 there for returned material. He had returned a bathtub there, a bathtub set that he had wanted to purchase and then changed his mind about it, but he had paid for it, and he was given credit for that; and there was a cash payment there that the bookkeeper had not entered in the files properly, and, consequently, he had not been able to pick it up in the billing. I was present at the time Mr. Gilbertson made that cash payment, and I remembered it, and we counted that up and made allowances for that.

Q. What was the amount of the bill after you and Mr. Gilbertson went over it and reduced it?

A. Well, it was the amount of the lien. I have forgotten now.

Q. Was it the amount that you filed the lien for?

A. Yes, it was.

Q. I believe the lien was filed for $1429.76 [227] Was that the balance then that——

A. That was the balance at that time, yes.

Mr. Bell: Now, we offer these tickets as being original entries as Plaintiff's Exhibit 1 in evidence.

Mr. Clegg: We object to them, your Honor, unless it is shown that that was a last statement of account that Reed and Lane furnished to Gilbertsons. The witness here testifies that there were some very important changes made in these original bills, so I would not see any use in encumbering the record with all these original bills at this time. We understand that the situation will develop so that in January or February they rendered another bill to Gilbertson, in which they say on the face of it that it supersedes all others that were ever given to Gilbertsons for this alleged work, and we think that is the basis of the suit, if anything. It isn't necessary to go into all these original bills.

Mr. Bell: Your Hon, that's right. He has just stated that this was superseded . . . these were corrected.

The Court: You withdraw them then? You withdraw your offer?

Mr. Bell: No, I offer them, because he says these are the ones that were amended and approved by Mr. Gilbertson.

The Court: I will sustain the objection at present. Exception allowed Plaintiff.

V.

The Court erred in sustaining the objection of the Defendant to material, competent and relevant [228] evidence as follows to-wit:

"Q. Mr. Lane, I mean, you have heard Mr. Clegg's statement about sending him a statement later that superseded all other statements. Who

did that? Did you? A. That is correct, yes.

Q. And is that statement based upon these particular bills as you and George corrected them that day.

Mr. Clegg: Just a moment. We object to that as irrelevant, incompetent, and immaterial and leading.

The Court: The objection will be sustained.

Mr. Bell: Exception.

VI.

The Court erred in sustaining the objection to competent, relevant and material evidence, as follows, to-wit:

Q. What was that statement based upon, the corrected statement that was mailed to him? What was that based upon?

A. That was based upon the adjustments that Mr. Gilbertson and I made on the time cards and on the invoices.

Q. And are these the invoices that are marked Plaintiff's Identification No. 1?

A. Those are the time cards there, yes, sir.

Q. Those are the ones that were before you and Mr. Gilbertson, the ones the adjustments were made on? A. That's right.

Mr. Bell: I again offer these.

Mr. Clegg: We make the same objection as heretofore without repeating it. [229]

The Court: I don't think these are admissible anyway, unless they form a part of the regular bookkeeping system, and in that case the first record

which takes in all of the items is the correct one to introduce.

Mr. Bell: All right, your Honor, but I thought he would testify they were the first entries, the original entries, in their bookkeeping system.

The Court: Yes, but each one is a separate entry. ("Statement This Cancels and Supersedes All Previous Billings" dated February 19, 1945, was marked Plaintiff's Identification 2 by the Clerk of the court.)

Q. Mr. Lane, I hand you a statement that has been marked Plaintiff's Identification No. 2 and will ask you to state if that is an exact copy of the statement Mr. Clegg referred to as being mailed or being given to the defendant in this case . . . the defendants?

A. Yes that is the amended statement.

Q. Now, is that in the same condition outside of a few pencil marks along the edge, as it was at the time you made the original? A. Yes.

Mr. Bell: Mr. Clegg, do you object to me erasing some of my own notations on the side?

Mr. Clegg: Well, they might as well stay there if you say you made them.

Mr. Bell: I put them there . . . for the record. I now offer it in evidence.

Mr. Clegg: We object to it on the grounds that no contract or agreement has been established as alleged in the complaint, and this, therefore, is [230] incompetent, irrelevant and immaterial. There is no testimony here showing there was any agreement reached as to what the terms of this alleged

contract were, or what was supposed to be done by the plaintiffs in performance of the contract, or what the terms of the contract were.

The Court: The objection will be sustained, exception allowed.

VII.

The Court erred in sustaining the objection to competent, material and relevant evidence as follows, to-wit:

"Mr. Bell: Your Honor, he admits that the last material was furnished specifically in his pleadings on the 23rd day of December in paragraph 2. In paragraph two of his answer he admits that it was that day, and the evidence shows that there was material furnished on the 23rd and the 24th both. Mr. Reed showed some little thing on the 24th even, but the 23rd was the last matter that was stressed, except some small matter on the 24th, but he admits it was furnished on the 23rd, and that, of course, puts it within the period.

Mr. Clegg: If your Honor please, I would like to add a few words in explanation of that and in contradiction of it. It is true, as Mr. Bell states, that the plaintiffs having alleged that the work ceased on the 24th day of December, we admit it. We admit it clearly under mistake and misapprehension and misinformation with reference to the proof. Now they put a witness upon the [231] stand here, and he introduces the absolute records kept by the Plaintiffs in this case which shows conclusively and the testimony of the witness, in addi-

tion, shows conclusively that there was a hiatus between the 15th and 16th day of December up until the 23rd or 24th day of December, which can't be shown except by their own records, and we assumed, of course, that when a matter of that kind is placed in a pleading that it states the truth. Therefore, without wishing to call for an explanation of the books, or, showing of the books of the plaintiffs, the defendants erroneously admit the allegation in the complaint, that the work terminated and the materials ceased to be furnished to this property on the 23rd day of December; but we have now, your Honor, the exact testimony of the people who were supposed to know and who have kept a record of it, and, by their own testimony and by their records, they show that at the time this alleged lien was filed that it was outlawed, and we certainly are not to be prohibited by insisting upon a substantial matter of that kind by an erroneous admission. It is clearly erroneous. It isn't the truth, and that is what we are here for—to ascertain what the truth is, so we ask the court to allow us to amend the answer, if necessary, in that regard, and, instead of admitting that the work ceased, let us stand upon the proposition shown by their own evidence here that the work had ceased long prior to the actual time and legal time fixed by the statute for the filing of this lien. [232]

The Court: You wish to amend that part of your answer, do you?

Mr. Clegg: Yes, sir, and show that we deny that it was filed on the 23rd or the 24th and insert in

place of it the date shown by their own records—that it ended and terminated on the 16th day of December instead of the 23rd or the 24th, whichever the pleadings show.

Mr. Bell: I object to the amendment.

The Court: It may be amended to conform to the evidence.

Mr. Bell: Your Honor, the evidence—I want to call your attention to that—the tickets show that work was done on the 24th and he testified to it.

Mr. Clegg: Your Honor, he said he got a service by telephone to come out there and look at it, and they went out there and charged for one hour's time. That had nothing to do with the original agreement, nothing whatever.

Mr. Bell: He went out there and did the work on the 24th. He went out and fixed something that wasn't working.

The Court: That would be just a repair job. That wouldn't be part of the original contract.

Mr. Bell: The other was within the time, the 23rd is within the time, the material and work furnished on the 23rd.

The Court: The only other, as I recall it, was something on the 20th, the 16th, and the 20th is the very last. [233]

Mr. Bell: Just wait a minute. Let me look at those cards as to dates—here is one for the 27th.

The Court: There was no evidence about it.

Mr. Bell: I offered this, though, in evidence.

The Court: It doesn't make any difference, though. It wasn't received.

Mr. Bell: Now, your Honor, may I reopen my case just to offer these particular cards?

The Court: I will permit you to reopen your case.

Joseph Lane, a witness on behalf of the Plaintiffs, having been already duly sworn, on oath testified on further direct examination by Mr. Bell as follows, to-wit:

Q. I hand you a ticket, which seems to be an invoice marked Plaintiffs' Identification No. 1 in this case, and I will ask you to state if you know who made the call or did the work on that?

A. I did the work.

Mr. Clegg: Just a minute. We object to this your Honor, as supplementary to the prima facie case made by the Plaintiffs and serves to contradict their own testimony and is not permissible as rebuttal evidence, because there is no foundation laid for it, and otherwise it is irrelevant, incompetent and immaterial.

The Court: No foundation has been laid for the use of any such memorandum yet.

Q. Well, is this an original, a part of the original records in your office? A. Yes.

Q. Is that a part of the bookkeeping, general bookkeeping system of your office? A. Yes.

Q. Now, when and under what circumstances are [234] cards like that made?

A. They are made by the man, whoever did the work, at the time the work was done.

Q. And who did the work on the date indicated at the top of this time card? A. I did it.

Q. Did you date it?

A. Yes, I dated it.

Q. Is it in your handwriting? A. Yes.

Q. Now, then, did you at that time go upon the premises of the defendant at the Ranch and do work there? A. Yes.

Mr. Bell: Now, I offer this in evidence.

Mr. Clegg: Just a minute, your Honor. Well, that is the same thing that was introduced here by Mr. Reed: call on burner, labor, one hour, service; it says 'service' and it is dated 12/24/44. That is the very identical thing Mr. Reed was talking about. We ask that it be excluded, your Honor, and disregarded entirely on the ground that it is incompetent, irrelevant and immaterial and has already been testified to by a witness on direct examination, by Mr. Reed on direct examination and cross examination.

The Court: Objection sustained, exception allowed Plaintiff."

VIII.

The Court erred in sustaining objection to Plaintiff's evidence that was competent, relevant and material as follows, to-wit:

"Q. Mr. Lane, what was the occasion for your going out to the Ranch on the 24th day of December, 1944?

A. I was called out there because they were having trouble with [235] the oil burner.

Q. Is that the oil burner you had put in?

A. That's right.

Q. Was that a part of the regular contract work that you had done for them?

A. Well, ordinarily a service call, a service charge, wouldn't have been made there, but, due to the fact that they had taken that burner out themselves and worked on it themselves a few times, we made a service charge on that account, and it was part of the original work.

Q. And did you do the work after you got out there? A. I did, yes.

Q. Have you ever been paid for this work?

A. No.

Q. And this is included in the work that you and George Gilbertson talked over at the time you were going over these tickets?

A. That's right.

Mr. Clegg: We object to that as irrelevant and immaterial.

The Court: Objection sustained, exception allowed Plaintiff."

IX.

The Court erred in sustaining Defendant's objection to material, competent, and relevant evidence offered on the part of the Plaintiff as follows, to-wit:

"Q. Was this ticket present when you and Mr. Gilbertson, George Gilbertson, were going over the charges and the dispute between you as to the charges and the labor done out there?

A. Yes, it was there with the other time cards.

Q. Was it one of the cards that was agreed upon by you and Mr. Gilbertson at that time?

Mr. Clegg: I object to that as incompetent, irrelevant, and immaterial, not proper direct examination at this time, and it is outside of the issues.

The Court: I think it is also incompetent. I will sustain the objection. Exception allowed Plaintiff."

X.

The Court erred in sustaining the defendant's objection to competent, relevant and material evidence, as follows, to-wit:

"Q. You did work on the 24th day of December, 1944, for the defendants in this case?

A. Yes.

Q. And that was the occasion for making this particular charge? A. Yes.

Mr. Bell: We re-offer the card in evidence.

Mr. Clegg: We object to it on all the grounds already stated, your Honor, and that it is not proper rebuttal evidence and that there is no foundation laid for its introduction. It has already been testified to by one of the witnesses on the case in chief. It is incompetent, irrelevant and immaterial.

The Court: Objection sustained, exception allowed Plaintiff.

Mr. Bell: Your Honor, may I say this, please: It is not rebuttal evidence. You allowed me to reopen my case in chief, and this is evidence after you have permitted an amendment in the answer.

The Court: I am not ruling on it on the ground that it is rebuttal. I ruled on it on the other grounds, exception allowed Plaintiff." [237]

XI.

The Court erred in admitting incompetent, irrelevant and immaterial and prejudicial evidence on the part of the Defendant as follows, to-wit:

Q. Now, just describe, if you will, what was the character of the damage to the building caused by these previous burners?

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the issues here.

The Court: I think that is without the issues, isn't it? You don't ask for special damages.

Mr. Clegg: We don't ask for any special damages, but I wanted to inform the court as to the character of the damage, or destruction, which these burners caused to the interior of the building, being the burners that were installed by the Plaintiffs in the action, just generally. I don't want to go into the details of it, but I would like to show that it was something more than a mere temporary and trivial destruction, item of destruction.

The Court: Very well, I will permit you to show it.

Mr. Bell: Exception.

XII.

The Court erred in overruling Plaintiff's objection to incompetent, irrelevant and immaterial and prejudicial evidence as follows, to-wit:

Q. Before this accurred, what was the condition of the interior of the building?

A. It was all new.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial, and not within the issues presented. [238]

The Court: Objection overruled.

Mr. Bell: Exception.

A. The building was all new, all varnished.

Q. What did you have to do to get rid of the soot, if anything?

Mr. Bell: I object to it for the same reason.

The Witness: We had to wash the whole interior of the building.

Mr. Bell: And now I move that the answer be stricken. It was given before the court had an opportunity to rule on the objection.

The Court: The motion will be denied.

Mr. Bell: Exception.

XIII.

The Court erred in denying Plaintiff's motion to strike as follows, to-wit:

Mr. Bell: I move to strike all of his testimony about the boiler not working, the burner not working, and the sooting of the place, for the reason that it is outside of the issues, and there is no dispute, there is no contention that it was a contract to do anything except furnish some labor and material; and this is not defensive matter, because if they had made a contract to do some particular thing for a certain amount, it would be an implied warranty that it would work, but there is no testimony of any implied warranty, and I move to strike that part of the answers.

The Court: Motion denied.

Mr. Bell: Exception. [239]

XIV

The Court erred in overruling Plaintiff's objection to incompetent, irrelevant and immaterial and prejudicial testimony as follows, to-wit:

Q. How did that dirt and soot originate? What was the cause of that?

A. I really don't know, only when it would shut down and then start up, it would just blow off the doors, or open, rather, and then just a lot of soot would come out all over.

Q. Was your interior perceptibly hurt?

A. Yes.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the pleadings.

Q. Just generally speaking.

The Court: Objection overruled.

Mr. Bell: Exception.

XV.

The Court erred in overruling Plaintiff's motion to strike all of the evidence with relation to soot or damage as follows, to-wit:

Mr. Bell: Comes now the plaintiff and moves to strike all of the evidence with relation to the soot or damage done to the building for two reasons: One, that it is not within the pleadings, and for the next reason that there has been no proof at all, whatsoever, of any warranty of this old second-hand burner that everyone knew was an old, second-

hand burner that was put in there for a temporary use, and, therefore, it was not guaranteed not to smoke; and it was evidently known that it was defective, or it wouldn't have been installed just for a temporary use until [240] better burners could be obtained. Therefore, I move to strike all of this testimony as to the damage because it would not be binding on these plaintiffs, who didn't warrant this old burner not to smoke.

The Court: Motion denied.

Mr. Bell: Exception.

XVI.

The Court erred in sustaining the Defendant's objection to the Plaintiff's offer to prove as follows, to-wit:

Mr. Bell: Exception. Your Honor, may I make an offer then? I offer to prove by this witness, if he was permitted to testify, that he had a conversation with Mr. Montgomery, who was a regular employee of the defendants in this action, and that in this conversation Mr. Montgomery told him that he had taken this electrode out and worked on it two or three times and that when Mr. Lane examined it, it was broken—the electrode was broken—and that he repaired it; that he did not have a new electrode to substitute or replace this one, and he repaired it so that it worked good at the time and placed it back, and it worked all right at the time. I offer to prove that.

Mr. Clegg: To which we make the same objection as before.

The Court: Objection sustained, exception allowed Plaintiff.

XVII.

The Court erred in refusing the Plaintiff's offer to prove as follows, to-wit:

Mr. Bell: Exception. I offer to prove at this time [241] by this witness, if permitted to testify that when he talked to Gilbertson about taking out the new burner that it was working all right at the time, but Mr. Gilbertson though it was consuming too much oil because it burned too much of the time to keep the boiler hot and wanted a larger burner, and that this witness told Mr. Gilbertson at the time that he had an old burner that he could have for $100.00, and he would take the new burner out and give him credit for the full $250.00, the amount he had charged him for the new burner, and then if he could, if Mr. Gilbertson could get a larger burner, any better burner, that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the $100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work.

Mr. Clegg: To which we object, if the court please, upon the grounds heretofore stated and especially on the ground that it isn't rebuttal testimony, and no foundation has been laid for this question, or series of questions.

The Court: Objection sustained, exception allowed Plaintiff.

XVIII.

The Court erred in making the memorandum as to findings of facts and conclusions of law which is in words and figures as follows, to-wit:

MEMORANDUM AS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW IN NO. 5288

FINDINGS OF FACT

1. That between the 16th day of August, 1944, and the 20th day of December, 1944, inclusive, plaintiffs [242] and the defendants entered into an oral agreement whereby plaintiffs agreed to furnish an adequate first-class heating system for defendants' building, known as "The Ranch," upon the land described in the amended complaint herein and install the same therein, and the defendants agreed to pay therefor the reasonable and customary value of the same;

2. That between the 1st day of October, 1944, and the 16th day of December, 1944, plaintiffs installed an alleged heating system in said building; that the same was not adequate to heat the said building and was not a first-class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of $195.00;

3. That defendants detached from said building and premises and refused to keep the same the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and charged

defendants therefor the sums of $175.00 and $100.00, respectively; that the defendants tendered said boiler and burner, as personal property, back to plaintiffs, and the same is now their property;

4. That between the 16th day of August, 1944, and the 20th day of December, 1944, both dates inclusive, the plaintiffs and defendants entered into an oral contract, whereby the plaintiffs agreed to furnish and install certain plumbing and sheet metal in said Ranch, and the defendants agreed to pay therefor the reasonable value thereof; [243]

5. That pursuant to said last-mentioned agreement the plaintiffs furnished and installed said plumbing and sheet metal in said Ranch, the last material being furnished and the last labor in the installation of the same being done upon the 20th day of December, 1944;

6. That the reasonable value of said plumbing and sheet metal and the installation of the same was as shown upon plaintiffs' exhibit "A", to-wit, $326.89, composed of the following:

Plumbing, $57.00.
Well point, $8.00.
Xzit, $2.00.
Spray pump, $1.00.
2-inch coupling, $1.10.
Fittings, $13.30.
Balance on electric range, $50.00.
Fittings, $3.15.

7. That the plaintiff's lien claim in this action,

having been filed for record upon the 21st day of March, 1945, was filed more than 90 days after the last work or last material was furnished under said contracts and, therefore, was filed after the time allowed by law, for filing such a lien claim.

8. That upon the 24th day of December, 1944, the plaintiffs made a service call to adjust or repair the oil burner at said Ranch and made a charge of $3.00 therefor; that the same was not pursuant to the above-mentioned contracts or either of them and formed no part of the performance of either of said contracts, and no lien claim was filed for said $3.00 charge;

9. That defendants paid plaintiffs on said contracts or were by agreement of plaintiffs allowed the following claims for the following matters, to-wit: [244]

$250.00 cash paid;
250.00 for bathroom set of defendants delivered to plaintiffs;
50.00 for defendants hand fired boiler delivered to plaintiffs;
60.00 for defendants' material purchased from Palfy and delivered to plaintiffs;

Total $610.00.

CONCLUSIONS OF LAW

1. That Plaintiffs have no lien upon said Ranch or premises;

2. That the defendants have paid in full all sums owing the plaintiff upon said contracts;

3. That the defendants are entitled to recover their costs and disbursements in this action;

4. That said boiler and oil burner which were detached from said heating system are the property of the plaintiffs.

XIX

The Court erred in signing and filing the findings of fact and conclusions of law prepared by counsel for the Defendants as follows, to-wit:

In the District Court for the Territory of Alaska, Fourth Division

No. 5288

Joseph Lane, Henry E. Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, Plaintiffs, vs. George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, and The First National Bank of Fairbanks, Alaska, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered That the above entitled cause came on regularly for trial on the 4th day of February, 1946, at the hour of ten o'clock a.m., at which time [245] said cause had been theretofore regu-

larly set for trial, said day being one of the Court days of the General March, 1945, Term of the above entitled Court. Plaintiffs Joseph Lane and Henry E. Reed appeared in person and said plaintiffs were represented by their attorney, Bailey E. Bell. The defendants George Gilbertson and Harvey Gilbertson appeared in person and by their attorney, Cecil H. Clegg. The defendant, The First National Bank of Fairbanks, Alaska, did not appear at said trial. Plaintiffs and defendants George Gilbertson and Harvey Gilbertson announced readiness for trial and the same was thereupon proceeded with. Certain oral testimony and documentary proofs were submitted by plaintiffs in their behalf, who then rested. Said defendants submitted oral testimony and documentary proofs in their behalf and then rested. Whereupon said Court, having considered the proofs and evidence in said cause and the arguments of counsel, and being fully advised in the premises, does now make and enter the following

FINDINGS OF FACT

I.

That between the 16th day of August, 1944, and the 20th day of December, 1944, inclusive, plaintiffs and defendants, George Gilbertson and Harvey Gilbertson, entered into an oral agreement whereby plaintiffs agreed to furnish an adequate first-class heating system for the building of said defendants known as "The Ranch" upon the land described in the Amended Complaint herein, and to install the

same in said building, and that said [246] defendants agreed to pay therefor the reasonable and customary value of the same.

II.

That between the 1st day of October, 1944, and the 16th day of December, 1944, plaintiffs installed an alleged heating system in said building; that the same was not adequate to heat said building and was not a first class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of $195.00.

III.

That said defendants detached from said building and premises, and refused to keep the boiler and oil burner which plaintiffs had installed therein as a part of said heating system and for which plaintiffs had charged said defendants the sum of $175.00 and $100.00, respectively; that said defendants tendered said boiler and oil burner, as personal property, back to the plaintiffs, and the same are now their property.

IV.

That between the 16th day of August, 1944, and the 20th day of December, 1944, both dates inclusive, plaintiffs and said defendants entered into an oral contract whereby plaintiffs agreed to furnish and install certain plumbing and sheet metal in said Ranch building, and said defendants agreed to pay therefor the reasonable value thereof.

V.

That, pursuant to said last mentioned agreement, plaintiffs furnished and installed said plumbing and sheet metal in said Ranch building, the last material [247] being furnished and the last labor in the installation of the same being done upon the 20th day of December, 1944.

VI.

That the reasonable value of said plumbing and sheet metal and the installation of the same was as shown upon plaintiffs' Exhibit A introduced in evidence herein, to-wit, $326.79, composed of the following:

Plumbing	$ 57.00
Well point	8.00
Xzit	2.00
Spray pump	1.00
2-inch coupling	1.10
Fittings	13.30
Balance on electric range	50.00
Fittings	3.15
Sheet metal	191.24

VII.

That plaintiff's lien claim in this action, having been filed for record upon the 21st day of March, 1945, was filed more than ninety days after the last work or last material was furnished under said contracts, and, therefore, was filed after the time allowed by law for filing such a lien claim.

VIII.

That upon the 24th day of December, 1944, plaintiffs made a service call to adjust or repair the oil burner at said Ranch building and made a charge of $3.00 therefor; that said charge was not pursuant to the above mentioned contracts, or either of them, and formed no part of the performance of either of said contracts, and no lien claim was filed for said $3.00 charge.

IX.

That said defendants paid plaintiffs on said contracts or were, by agreement of plaintiffs, allowed the folowing credits for the following matters, to-wit:

$250.00	cash paid;
250.00	for bathroom set of defendants delivered to plaintiffs;
50.00	for defendants' hand-fired boiler delivered to plaintiffs; and
60.00	for defendants' material purchased from Paul Palfy and delivered to plaintiffs.
Total . . . $610.00	

And from the foregoing Findings of Fact, the Court does now make and enter the following

CONCLUSIONS OF LAW

I.

That plaintiffs have no lien upon said Ranch building or premises described in the Amended

Complaint herein, and that they take nothing by this action.

II.

That said defendants have paid in full all sums owing to plaintiffs upon said contracts.

III.

That said boiler and oil burner which were detached from said heating system by said defendants are the property of plaintiffs.

IV.

That said defendants are entitled to recover from plaintiffs their costs and disbursements in this action.

V.

That judgment and decree may be entered accordingly.

Done in open Court at Fairbanks, Alaska, this 18th day of February, 1946.

HARRY E. PRATT,

District Judge.

Entered in Court Journal No. 33, Page 237, Feb. 18, 1946.

(Acknowledgment of Service.) [249]

XX.

The Court erred in rendering the final judgment in this action as follows, to-wit:

In the District Court For the Territory of Alaska, Fourth Division

No. 5288

Joseph Lane, Henry E. Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, Plaintiffs, vs. George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and The First National Bank of Fairbanks, Alaska, Defendants.

JUDGMENT

Be It Remembered That the above entitled cause came on regularly for trial on the 4th day of Feburary, 1946, at the hour of ten o'clock a.m., at which time said cause had been theretofore regularly set for trial, said day being one of the Court days of the General March, 1945, Term of the above entitled Court. Plaintiffs Joseph Lane and Henry E. Reed appeared in person, and said plaintiffs were represented by their attorney, Bailey E. Bell. The defendants George Gilbertson and Harvey Gilbertson appeared in person and by their attorney, Cecil H. Clegg. The defendant, The First National Bank of Fairbanks, Alaska, did not appear in said action. Plaintiffs and defendants announced readiness for trial and the same was thereupon proceeded with. Certain oral testimony and documentary proofs were submitted by plaintiffs in their behalf, who then rested. Said defendants submitted oral testi-

mony and documentary proofs in their behalf and then rested. Whereupon said Court, having considered the proofs and evidence in said cause and the arguments of counsel, [250] and having heretofore made, filed, and entered herein its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

Now Therefore, By virtue of the law and the premises,

It Is Hereby Ordered and Adjudged That the plaintiffs above named are not entitled to a lien upon the premises of defendants George Gilbertson and Harvey Gilbertson known as "The Ranch," described in plaintiffs' Amended Complaint herein, and that said plaintiffs take nothing by this action.

It Is Further Ordered, Adjudged and Decreed That said defendants, George Gilbertson and Harvey Gilbertson, have paid in full all sums owing to plaintiffs upon the contracts set forth in plaintiffs' said Amended Complaint herein, and that said defendants have and recover of and from said plaintiffs above named their costs and disbursements herein, taxed by the Clerk of this Court at the sum of $....., and that execution may issue therefor.

It Is Further Ordered, Adjudged, and Decreed That the plaintiffs above named are entitled to the immediate possession of the boiler and oil burner installed by them in the premises of said defendants known as "The Ranch," described in plaintiffs' said Amended Complaint.

Done in Open Court at Fairbanks, Alaska, this 15th day of March, 1946.

/s/ HARRY E. PRATT,
District Judge.

Entered in Journal No. 33 Page 300 March 15, 1946.

(Acknowledgment of Service.) [251]

XXI.

The Court erred in overruling the Plaintiff's motion for a new trial on the 15th day of March, 1946.

XXII.

The Court erred in overruling and denying the Plaintiff's amended motion for a new trial on March 15, 1946.

XXIII.

The Court erred in filing and entering judgment for the Defendants on March 15, 1946.

XIV.

The Court erred in the Findings of Fact above set forth and the entering of judgment; in that said findings of fact and conclusions of law and judgment based thereon were not supported by any competent evidence.

XXV.

The Court erred in filing and signing the Findings of fact above set forth and in entering judgment for the defendants for the further reason that it was against the clear weight of the evidence in the

case and contrary to all reasonable and proper deductions based thereon.

For all of which the Plaintiffs believe they have been denied a fair and impartial trial and therefore pray an appeal to the Ninth Circuit Court of Appeals of the United States in said cause.

/s/ BAILEY E. BELL,
Attorney for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed April 5, 1946. [252]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE OF APPEAL on Defendant First National Bank of Fairbanks, Alaska.

United States of America,
Territory of Alaska, ss.

J. H. McLean being first duly sworn on oath deposes and says that he is over the age of twenty-one years and competent to be a witness in the above-entitled cause.

That on the 5th day of April, 1946, at Fairbanks, Alaska he served the following designated papers upon defendant First National Bank of Fairbanks, Alaska, by then and there handing E. H. Stroecker, president of said bank copies of the following designated papers, to-wit:

Notice of Appeal to the Ninth Circuit court;

Petition for Allowance of Appeal;

Order Allowing Appeal and Fixing Bond;

Assignment of Errors;

Citation

all of said copies of said papers having been certified to as full, true, and correct copies of the originals on file in this Court and Cause by Bailey E. Bell, attorney for plaintiffs.

Dated at Fairbanks, Alaska, this 5th day of April, 1946.

/s/ J. H. McLEAN.

Subscribed and sworn to before me this 5th day of April, 1946.

[Seal] /s/ J. G. RIVERS,
Notary Public in and for Alaska.
My Comm. Expires 2/18/1950.

[Endorsed]: Filed April 5, 1946. [253]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND

Now on this 5th day of April, 1946, the same being one of the days of the January, 1946, Term of this Court, This Cause came on regularly to be heard upon the petition of the Plaintiffs herein for the allowance of appeal in behalf of said Plaintiffs from the final judgment entered in said cause on

the 15th day of March, 1946, and from the judgment of the Court overruling the motion for a new trial and the amended motion for a new trial on the 15th day of March, 1946, and also fixing the amount of appeal bond on said appeal, and the place of hearing said appeal, and said Court being fully advised in the premises.

Does Hereby Find that the amount of appeal bond should be $250.00,

Now Therefore, It Is Hereby Ordered that the appeal of said Plaintiffs from the final judgment entered herein on the 15th day of March, 1946, and the judgment of the Court overruling the motion for a new trial and the amended motion for a new trial, said judgment being entered on January 15, 1946, be and the same is allowed to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of the records, proceedings, orders, judgment, testimony, and all other proceedings in said Matter in which said judgment appealed from is based be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before 40 days from this date to be heard at San Francisco, California, and

It Is Further Ordered that the amount of the appeal bond be, and is hereby fixed at the sum of $250.00, said bond to be submitted and approved by the undersigned Judge of this Court, and

It Is Further Ordered that in preparing and printing the record on appeal in said cause the title of the Court and Cause shall be printed on

the first page of said record, and that thereafter it may be omitted and in its place the words "Title of Court and Cause" may be inserted and that all endorsements on all papers may be omitted except the clerk's filing marks and admissions of service.

Done in Fairbanks, Alaska, on the 5th day of April, 1946.

/s/ HARRY E. PRATT,

District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed April 5, 1946. [255]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents, that we Joseph Lane, Henry Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, Plumbers, Heaters and Sheet Metal, as principals and Henri F. Dale and Marion Brown as sureties are held and firmly bound unto the United States of America in the sum of Two Hundred Fifty ($250.00) Dollars to be paid to the United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of June, 1946.

Whereas, lately in the District Court of the United States for the Fourth Division of the Territory of [256] Alaska in a suit *de*pending in said Court between Joseph Lane, Henry Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, Plaintiffs, and George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and The First National Bank of Fairbanks, Alaska, Defendants, a judgment was entered against the said Plaintiffs herein, granting to the defendants herein, George Gilbertson and Harvey Gilbertson, a judgment against the Plaintiffs, denying Plaintiffs any recovery and rendering judgment for costs against them, and said Plaintiffs having filed in said Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit at a session of said Court of Appeals to be holden at San Francisco, in the State of California.

Now the conditions of the above obligation is such that if the said Joseph Lane, Henry Reed and Stanley Smith, Partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, shall prosecute said appeal to effect and to pay all costs that may be taxed against them if for any reason the appeal is dismissed, or if the judgment is affirmed, then and in

that event the above obligation to be void, otherwise to remain in full force and virtue.

Signed, Sealed and Acknowledged this 7th day of June, 1946.

REED AND LANE,

Plumbers, Heaters and Sheet Metal,

By /s/ HENRY E. REED,

Principals.

/s/ HENRI F. DALE,

/s/ MARION BROWN,

Sureties. [257]

United States of America,
Fourth Division,
Territory of Alaska—ss.

AFFIDAVIT

Henri F. Dale and Marion Brown being duly sworn each for himself, deposes and says:

That he is a free holder in said District and is worth the sum of Five Hundred ($500.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

/s/ HENRI F. DALE,

/s/ MARION BROWN.

Subscribed and sworn to before me this 7th day of June, 1946.

/s/ BAILEY E. BELL,
Notary Public for the Territory of Alaska. My Commission expires 1/28/49.

Foregoing Bond is approved.

/s/ CECIL H. CLEGG,
Attorney for Gilbertsons.

Approved this 11th day of June, 1946.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed June 11, 1946. [258]

[Title of District Court and Cause.]

CITATION

The President of the United States:

To the above named Defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and The First National Bank of Fairbanks, Alaska, and their Attorney of Record, Hon. Cecil Clegg,

Greetings:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, California, pursuant to an order allowing an appeal and entered in the above entitled

action on the 25th day of April, 1946, in which Joseph Lane, Henry Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane plumbers, heaters and sheet metal are plaintiffs and appellants, and George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, and The First National Bank of Fairbanks, Alaska, are Defendants, and Appellees, to show cause, if any there be, why the judgment entered in said cause, on March 15, 1946, in favor of the Defendant above named, and against the above named Plaintiffs, and in the said judgment overruling the motion for a new trial and the amended motion for a new trial, should not be corrected, set aside and reversed and why speedy justice should not be done to Plaintiffs and appellants and defendants appellees above named.

Witness The Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, on this 5th day of July, 1945.

Attest my hand and the seal of the above named Court for the Territory of Alaska, Fourth Judicial District on this 5th day of July, 1946.

/s/ HARRY E. PRATT,

District Judge.

[Endorsed]: Filed July 5. 1946. [260]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To John B. Hall, Clerk of the above-entitled Court.

You will please prepare transcript of record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, setting in San Francisco, California, heretofore perfected to said Court and include therein the following papers and records to-wit:

1. Original Complaint.
2. Demurrer.
3. Amended Complaint.
4. Demurrer—5/14/45.
5. Demurrer—5/23/45.
6. Minutes and rulings on Demurrer.
7. Answer of Defendants.
8. Reply of Plaintiffs.
9. The findings of fact and conclusions of law.
10. The motion for a new trial showing the date of filing.
11. Amended motion for a new trial.
12. Order denying motion.
13. Judgment of the Court.
14. Notice of appeal to the Ninth Circuit Court of Appeals.

15. Transcript of Testimony and proceedings before the Court.

16. Affidavid of mailing.

17. Petition for Allowance of Appeal.

18. Assignment of Errors.

19. Affidavit of service.

20. Order allowing appeal and fixing amount of appeal bond.

21. Appeal Bond.

22. Citation on Appeal.

23. Praecipe for transcript of record.

24. Bill of Exceptions.

25. Stiplation granting additional time to file objections and purposed amendments to Bill of Exceptions.

26. Order granting additional time to file, record and docket cause.

This transcript is to be prepared as required by the law and the rules and orders of this Court and of the Circuit Court of Appeals for the Ninth Circuit, and is to be forwarded to the Clerk of said Ninth Circuit Court of Appeals, at San Francisco, California, so that it will be docketed therein on or before the 20th day of July, 1946, pursuant to the order of this Court.

Dated at Fairbanks, Alaska, on this 3rd day of July, 1946.

/s/ BAILEY E. BELL and
/s/ WARREN A. TAYLOR,
Attorneys for Appellants, Joseph Lane, Henry E. Reed and Stanley Smith.

(Acknowledgment of Service.)

[Endorsed]: Filed July 3, 1946. [262].

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

The Plaintiffs respectfully present the following Bill of Exceptions for allowance and settlement upon the appeal taken from the rulings, orders and judgment of the Court as set forth in this Bill of Exceptions and as set out in the Assignments of Errors and Notice of Appeal filed herein, which will be herein presented in the routine and times of the happenings thereof as near as possible, the first of which the Plaintiffs complain as follows:

I.

On March 31, 1945 the Plaintiffs filed their original complaint herein which will be set out in full in the transcript of record and hereby made a part of this Bill of Exceptions by reference. To this Complaint the Defendants, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, filed their demurrer, which

demurrer will be set forth in full in the transcript of record and made a part of the Bill of Exceptions by reference; on May 4, 1945 the Court made an order sustaining said demurrer, said order will be set forth in the transcript of the record and is hereby made a part of this Bill of Exceptions by reference; To this ruling of the Court the Plaintiff's excepted, and an exception was allowed.

II.

Thereafter and on the 9th day of May, 1945, Plaintiffs filed their amended complaint, a copy thereof will be set forth in full in the transcript of the record and is hereby made a part of this Bill of Exceptions by reference; on May 14, 1945 the said defendants filed their demurrer to the amended complaint; Thereafter, on May 15, 1945, the trial Court entered an order sustaining the demurrer and permitted the Plaintiff's to amend by interlineation, a copy of said order will be set forth in the transcript of the record and is hereby made a part of this Bill of Exceptions by reference; Thereafter, on May 23, 1945, the same defendants filed another demurrer to the complaint as amended, a copy of said demurrer will be set forth in the transcript of the record and is hereby made a part of this Bill of Exceptions by reference; Thereafter and on the 25th day of May, 1945, the Court entered an order sustaining the demurrer and gave the plaintiffs permission to amend by interlineation to show Fairbanks is in the Territory of Alaska, a copy of said order will be set forth in

the transcript of the record and made a part of this Bill of Exceptions by reference.

III.

On February 4, 1946 the cause came on for trial and Plaintiffs complain of all of the following proceedings:

One of the Plaintiffs to-wit: Joseph Lane, was called as a witness and testified that he was a member of the partnership of Reed and Lane; that at the time the work was done that is involved in this law suit there was another man by the name of Smith in the partnership, and that he and Reed had since the filing of this suit purchased and took an assignment of all of the interest of Mr. Smith and the partnership now is just Joseph Lane and Henry E. Reed, doing business as Reed and Lane; [264] That he knew George Gilbertson; That he was taken out to Mr. Gilbertson's place by a Mr. Walker of the Walker Construction Company; That George Gilbertson was at that time at The Ranch in the bar room; That was sometime in August, 1944; That at that time he had a conversation with George Gilbertson; That Mr. Gilbertson wanted a steam system put in and was going to put the boiler down in the basement but his basement was flooded; They talked it all over; he advised him to put in a hot water job because that was more economical to operate. Nothing could be done until the basement was dried out. Mr. Gilbertson laid out the fact that he wanted unit heaters there in the bar room and dance hall. He said he would

like to have me do the job when the basement was dry and we could get down in there to do it. I had another conversation with him sometime later about the same thing and then again when we decided to build a lean-to on to the outside of his ranch and put the boiler out in that lean-to. We talked it over and we couldn't get a hot water job in at that time so decided to go ahead and put in the steam job. It wasn't practical to put in a hot water job as laid out then. Mr. Gilbertson sent his man over to haul the boiler, the boiler sections, over to the lean-to, so we could get them set up.

Then this question was asked:

Q. Now, who was to do the supervision of this?

A. Well, there was nothing said about supervision at that time. Later on, though, Mr. Gilbertson had received the bill from Walker with quite a bit of supervision on it, and he told me he didn't want any supervision on that job.

Mr. Gilbertson told him he had been a steam fitter.

Then these questions and these answers given:

Q. And then, Mr. Lane, did you go ahead and put in the work that he asked you to put in?

A. Yes. All I did myself was work on the . . . help set that boiler up. From then on, why, there was a man out there at various times doing the work, and, so far as I know, George told him what to do. He said he didn't want supervision, so I cut it off.

Q. And you furnished the men, and that is all you did after that?

A. I furnished the men and what material Mr. Gilbertson came in and got or one of his men was sent in after.

He then testified that he had a conversation with Mr. Gilbertson about the bill; There was some errors in the bill and we had made some mistakes in the bill so Mr. Gilbertson and I went over it and there was some very glaring errors in there and we went over the bill and went over all the material out there and changed the bill, and I though that Mr. Gilbertson and I had reached an agreement. At least, when we left each other everything was in good shape, so it looked like he was satisfied and so was we.

Then these question were asked and these answers given:

Q. Did you have anything with you in the way of tickets, time and material tickets with you, at the time you went over this bill?

A. Yes, we had these tickets here.

Q. Now, were those tickets all gone over with Mr. Gilbertson? A. Yes, that's right.

Q. And are those tickets now in the same condition they were at that time?

A. Yes they are.

Q. Now, what are those tickets? Are they part of the regular records you keep, or the bookkeeping system at your place?

A. Yes, they are part of our time-keeping sy-

tem. Each man makes them out every night. [266]

Q. Are those the original and first entries made?

A. Yes, that's right.

Mr. Bell: I ask that they be marked as Plaintiff's Identification No. 1.

(Time tickets were marked Plaintiff's Identification No. 1 by the Clerk of the Court.)

Q. Mr. Lane, when you and Mr. Gilbertson were together and discussing this, did you make some changes and make some concessions to him there?

A. Yes, that's right.

Q. Will you tell the court what some of those changes were?

A. Well, Mr. Gilbertson had returned some material to us, and we came to an agreement there as to the price of that material. At first he hadn't been allowed enough on the material. There was an error in that, so in talking it over we came to a settlement on the material. I believe the amount was $60.00 there for returned material. He had returned a bathtub there, a bathtub set that he had wanted to purchase and then changed his mind about it, but he had paid for it, and he was given credit for that; and there was a cash payment there that the bookkeeper had not entered in the files properly, and, consequently, he had not been able to pick it up in the billing. I was present at the time Mr. Gilbertson made that cash payment, and I remember it, and we counted that up and made allowances for that.

Q. What was the amount of the bill after you and Mr. Gilbertson went over it and reduced it?

A. Well, it was the amount of the lien. I have forgotten now.

Q. What it the amount that you filed the lien for? A. Yes, it was.

Q. I believe the lien was filed for $1429.76. Was that the balance then that——

A. That was the balance then at that time, yes. [267]

Mr. Bell: Now, we offer these tickets as being original entries as plaintiff's Exhibit 1 in evidence.

Mr. Clegg: We object to them, your Honor, unless it is shown that that was a last statement of account that Reed and Lane furnished to Gilbertsons. The witness here testifies that there were some very important changes made in these original bills, so I would not see any use in encumbering the record with all these original bills at this time. We understand that the situation will develop so that in January or February they rendered another bill to Gilbertson, in which they say on the face of it that it supersedes all others that were ever given to Gilbertsons for this alleged work, and we think that is the basis of the suit, if anything. It isn't necessary to go into all these original bills.

Mr. Bell: Your Honor, that's right. He has just stated that this was superseded . . . these were corrected.

The Court: You withdraw them then? You withdraw your offer?

Mr. Bell: No, I offer them, because he says these are the ones that were amended and approved by Mr. Gilbertson.

The Court: I will sustain the objection at present.

Q. Mr. Gilberson, you have heard Mr. Clegg's statement about your later—Exception allowed Plaintiff.

To this ruling Plaintiffs objected.

Then these questions, answer and rulings took place:

Q. Mr. Lane, I mean, you have heard Mr. Clegg's statement about sending him a statement later that superseded all other statements. Who did that? Did you? A. That is correct, yes.

Q. And is that statement based upon those particular bills as you and George corrected them that day? [268]

Mr. Clegg: Just a moment. We object to that as irrelevant, incompetent, and immaterial and leading.

The Court: The objection will be sustained.

Mr. Bell: Exception.

To this ruling the Plaintiffs excepted.

Then the following questions were asked and answers given and rulings by the Court:

Q. What was that statement based upon, the corrected statement that was mailed to him? What was that based upon?

A. That was based upon the adjustments that Mr. Gilbertson and I made on the time cards and on the invoices.

Q. And are these the invoices that are marked Plaintiff's Identification No. 1?

A. Those are the time cards there, yes, sir.

Q. Those are the ones that were before you and Mr. Gilbertson, the ones the adjustments were made on? A. That's right.

Mr. Bell: I again offer these.

Mr. Clegg: We make the same objection as heretofore without repeating it.

The Court: I don't think these are admissible anyway, unless they form a part of the regular bookkeeping system, and in that case the first record which takes in all of the items is the correct one to introduce.

Mr. Bell: All right, your Honor, but I thought he *would* (did) testify they were the first entries, the original entries, in their bookkeeping system.

The Court: Yes, but each one is a separate entry. Exception allowed Plaintiff.

Then the following questions, answers and rulings were had of which these Plaintiff's in error complain: [269]

Q. Mr. Lane, I hand you a statement that has been marked Plaintiff's Identification No. 2 and will ask you to state if that is an exact copy of the statement Mr. Clegg referred to as being mailed or being given to the defendant in this case—the defendants?

A. Yes, that is the amended statement.

Q. Now, is that in the same condition outside of a few pencil marks along the edge, as it was at the time you made the original? A. Yes.

Mr. Bell: Mr. Clegg, do you object to me erasing some of my own notations on the side?

Mr. Clegg: Well, they might as well stay there if you say you made them.

Mr. Bell: I put them there—for the record. I now offer it in evidence.

Mr. Clegg: We object to it on the grounds that no contract or agreement has been established as alleged in the complaint, and this, therefore, is incompetent, irrelevant, and immaterial. There is no testimony here showing there was any agreement reached as to what the terms of this alleged contract were, or what was supposed to be done by the Plaintiffs in performance of the contract, or what the terms of the contract were.

The Court: The objection will be sustained.

Q. What were your agreements with Mr. Gilbertson as to what you were to be paid, if anything, for this work?

A. Well, we didn't make any agreement as to, as to the amount to be paid. It was a cost-plus job, is what it was. It was a time and material job, I should say, because we were just hired to put in that work.

Q. Was anything said about the salaries or wages you were to be paid?

A. No. He did ask me the first time I saw him what our charges, what our regular charge was [270] on labor, and that was about the only thing he asked me.

Q. What did you tell him?

A. I told him at that time it was $3.00 an hour.

Q. What was said by him then about your going ahead with the work, if anything?

A. Well, he wanted me to go ahead with it, yes. In fact, they sent down three men and insisted on getting the boiler in there. At that time we were very busy; we didn't get at it immediately when he wanted it. That is one of the reasons he sent his own men down after the boiler to haul it up there.

Q. Did you do the work in compliance with his request? A. Yes.

Q. Does this itemized statement, Plaintiff's Identification No. 2, show each item furnished and charged for and all of the labor furnished and charged for in this particular statement?

A. Well, it doesn't show all the materials, but it shows the invoice that lists that particular material, where it doesn't list the material itself.

Q. It does show the invoice capitulation?

A. That's right.

Q. Now, when was this given to Mr. Gilbertson?

A. Well, that was presented to him by Mr. Reed.

Q. You weren't present at that time?

A. No.

Q. Did you talk to Mr. Gilbertson, then, about this particular statement later?

A. No, I never talked to him after that. He and I worked that agreement out, and from then on he talked to Mr. Reed. I didn't have any more dealings with him.

Q. Then you and Mr. Gilbertson, after you had the conference you testified to, you never talked to him any more about the claim? A. No.

Q. I see. Mr. Lane, was the items of labor and material that you have testified about here, were

they all charged at the customary and regular price for labor of that kind in Fairbanks at that time?

Mr. Clegg: Just a minute. We object to that as leading and suggestive and merely a statement of counsel and not from the witness; and we also object to it on the grounds it is incompetent, irrelevant, and immaterial, and there has been no testimony showing or tending to show what character of materials were claimed to have been furnished by the witness, or by his firm, or by Reed, or what materials or labor were accepted and performed for the benefit of the defendants on this property.

The Court: There has been no testimony as to material or what the labor was. The objection will be sustained, exception allowed plaintiff.

He then testified that he knew of his own personal knowledge that the material listed in the identification above referred to was actually used and went into the building involved herein; that he and George Gilbertson went over the list piece by piece, went over the entire building there; went over the hours of labor in the conference, made a few corrections therein. That he kept a labor record and that plaintiffs labor record didn't exactly tally; that he made up the statement that was marked; this statement supersedes all other statements and that that statement is exact and correct as agreed upon between the witness and Mr. Gilbertson; Plaintiff's Identification No. 2 being the statement referred to was then introduced in evidence and is found in the transcript of the record at page 242 and 243 and is in words and figures as follows, to-wit: [272]

STATEMENT

This Cancels and Supersedes All Previous Billings

February 19, 1945

The Ranch, Fairbanks, Alaska.

	Charges	Credits	Balance
Sheet Metal			
Material and Labor	$ 191.24	Sheet Metal (Pencil Notation)	
Plumbing			
19 hours labor (Mechanic) @ $3.00	57.00		
Setting up Boiler and Header		(Pencil Notations:)	
62 hrs. labor (Mechanic) 3.00	186.00	by Kleing (Hilary	
65½ hrs. labor (Helper) 2.25	147.38	Evans	
1 hr. labor (Helper) 2.50	2.50	Crollard	
9½ hrs. labor (Mechanic) 3.00		$ 28.50	Lane
Hooking up Radiators and Unit Heaters			
109½ hrs. labor (Mechanic) 3.00	328.50		
9 hrs. labor (Helper) 2.50	22.50		
9 hrs. labor (Mechanic) 3.00		27.00	
1 hr. labor (Helper) 2.50		2.50	
(As per agreement)			
Material—Plumbing and Steam Fitting	568.13		
(As invoiced—Less Boiler and Burner)			
1 Well Point	8.00		
2 Cans Xsit, 1.00	2.00	George Gilbertson	
1 Spray Gun	1.00	(Pencil Notation)	
2 2″ Galv. Couplings, .55	1.10		
Assorted Fittings—Inv. 422	13.30		
Balance on Electric Range—Inv. 709	50.00		
Assorted Fittings—Inv. 893	3.15		
2 Unit Heaters, $97.50	195.00		
1 Williams Oil-o-Matic (Price as corrected)	100.00		
	$1,876.80	$ 58.00	

STATEMENT—(Continued)

This Cancels and Supersedes All Previous Billings

February 19, 1945

The Ranch, Fairbanks, Alaska.

	Charges	Credits	Balance
Balance forward	$1,876.80	$ 58.00	
1 Boiler (price as corrected)	175.00		
1 Thermostat	12.50		
3″ Copper Tubing @ .13	.39		
1 Adaptor "L"	.70		
1 Adaptor, Straight	.45		
1 Pressuretrol	10.50		
Covering Pipes			
6 hrs. labor (Mechanic) 3.00	18.00		
54′ Air Cell Covering	12.90		
27′ Air Cell Covering		6.48	
1 Reducer (Incorrect Charge)		3.00	
1 Hand Fired Furnace		50.00	
Returned Material (As per agreement)		60.00	
Cash on Account (11/25/44—Approx.)		250.00	
Cash Sale—Bathroom Set (Returned)		250.00	
	$2,107.24	$ 677.48	
Balance Due			$1,429.76

(Page 2)

That the statement showed all the charges and credits claimed as well as the balance due thereon.

On cross-examination he testified that he helped to do the work: "There were four of us working on that. That is just setting the base up and setting the boiler on it. It would probably take about two days, about 16 hours for the four men. It would be four times sixteen that it would take in

the way of hours." That he thinks that is about what it took to put it up.

That in the statement "That cancels and supersedes all previous billings" the number of hours that were required to set it up showed sixty-two hours of the labor of a mechanic 65½ hours labor for helper, 9½ hours labor of a mechanic. That that item covered the header. Also, that the header is quite an item on there, it is a four-inch pipe that has to join from one end of the boiler to another, and then the main hooks into the top of it and runs across the side of that lean-to and around the corner in there. And that is bricking up the inside of the boiler as well. That is all included in that item there. (Transcript pages 13 and 14.)

That the statement I made was just setting up the base and setting the boiler on it, was what I said would take about two days. That the job was a straight time and material job. That when a party comes to us and wants us to do work for them and don't want us to state a set contract price but just want us to furnish time and labor (materials) that is a time and material job. In other words we charge them for the time and material. There is no ten per cent plus charged. That the charge shown on the statement (this cancels and supersedes all previous bills) is a proper charge. That the man spent that much time. Mr. Gilbertson sent his own man after lots of the material. Mr. Reed is the plumber. That he had nothing to do with the boiler.

These questions were asked on cross-examination and these answers given:

Q. Now, the next item on here is hooking up radiators and unit heaters, one hundred nine and a half hours labor for mechanic, nine hours labor for helper, nine hours labor for a mechanic, one hour for helper, as per agreement. What is the significance of those words, "as per agreement?"

A. You will notice some of those are not charges; they are credits.

Q. What?

A. If you will read that correctly, some are not charges; some are credits.

Q. Some are credits. There is $28.50 credit altogether in connection with that particular item which winds up, "as per agreement?"

A. That's right. If you will notice, that correction is on labor there. That is where Gilbertson and I went over the time cards. That is the difference in our figures on the time cards, so I allowed him that much on the labor. I deducted those labor charges on the original account.

Q. You gave him credit for $28.50?

A. That's right. We deducted it. [275]

Q. Now, what is your statement with reference to this remark here at the bottom of this item, "hooking up radiators and unit heaters," "as per agreement?"

A. That was the agreement that Mr. Gilbertson and I had.

Q. That you had?

A. Yes, that is as Gilbertson and I agreed upon.

Q. Now, when was that agreement and what was the agreement about?

A. The agreement was about the corrections made in the bill.

Q. And you don't show on this bill what the items were that were presumed to be corrected?

A. But they do. That is what I was pointing out to you. The labor was correct there as per agreement.

Q. The labor was corrected as per agreement?

A. Yes, that is right there where you are reading it.

Q. You mean this hooking up radiators and unit heaters, that is the labor that was referred to?

A. You don't make yourself clear. I don't know what you mean.

Q. Well, you insert the statement "as per agreement" at the bottom of this item which consists of these four items that I have read over already and upon which you say there was a credit given by you to Gilbertson of $28.50. Now, what was these words "as per agreement" referring to. Does that refer to any agreement that was made at the time this work was started?

A. No, it refers to an agreement in the corrections in that particular paragraph that you are reading.

Q. Well, did you make any corrections in the previous items? A. The ones above there?

Q. Yes.

A. If there was any corrections made, they are shown.

Q. Well, there is nothing else shown till you come to this one which says, "as per agreement."

A. All right, [276] then, there was none others made.

Q. There was no others made?

A. The other items there was correct.

Q. They were correct. Now, will you tell the Court what agreement you made with Mr. Gilbertson at the time you commenced work out there? What was the contract? What were you to do, and what were you to be paid for it?

A. I was to put in a heating system.

Q. What kind of a heating system?

A. A steam-heating system.

Q. A steam heating system?

A. That's right.

Q. And is that what you put in?

A. That is what we put in.

Q. And when did you put in any other system, if you ever did?

A. We never put in any other system.

Q. You have never put in any other system at any other place?

A. I have put in lots of them.

Q. No, I mean here?

A. We never put but one system in there.

Q. How long did it remain there, do you know?

A. So far as I know, it is still there.

Q. It is still there. All you know is you didn't get paid for it? A. That's right.

Q. Don't you know it was taken out of there?

A. I don't know, no.

Q. You don't know? A. No.

Q. You never did understand that?

A. No. I understood that he was going to take it out and put the boiler in the basement at some future date when I put that one in there. Whether he did or not, I don't know.

Q. How many hours did you work out there yourself? A. Oh, I can't say offhand.

Q. What time did you start?

A. Approximately [277] four or five days.

Q. What time did you start?

A. What time did I start?

Q. Yes, start to work.

A. Well, I started at various times. Sometimes I was only out there an hour at a time.

Q. Yes, but what date did you first start to work on this project, putting in this steam plant?

A. What date did I start to work?

Q. Yes. A. It was in October.

Q. Was that your personal recollection or were you aided by your entries in your bookkeeping system?

A. I was aided by the entries in our bookkeeping system. I don't remember off-hand just what date it was when we started there.

Q. When did you quit and walk away from there? A. When the job was completed.

Q. When was that?

A. Oh, it was in December—late in December.

Q. Late in December?

A. Yes, somewhere around Christmas time.

Q. Well, you put in four days during that period?

A. That's right. Four or five; something like that. I couldn't say offhand.

Q. During the period of two months?

A. Yes.

Q. Well, was there—did you have a substitute up there when you weren't there yourself?

A. I had a man there.

Q. What was the name of the man?

A. There was two of them there at various times. There was a man by the name of Kling who set the boiler up and set up the header and run the main, and Woodcox finished up the job.

Q. Woodcox? A. Yes. Wilcox.

Q. Wilcox? A. Wilcox, yes. [278]

Q. Did they use this boiler during the period from when you commenced work until you say you quit, in the latter part of December?

A. Yes. They used it after we got some of the heaters hooked to it so it could be used.

Q. Did you ever go out there and see it when it was in operation? A. Yes.

Q. How many times?

A. I imagine a half-dozen times.

Q. A half-dozen times? A. Yes.

Q. Do you know the last time you were out there?

A. Oh, I was out there taking material off along in—oh, along in January, I believe. I couldn't say for certain. I have no way of dating that.

Q. Did you have anything to do with putting in an oil system there later? A. Later?

Q. Yes. A. No.

Q. You never?

A. No. We changed one oil burner while we were still working on it.

Q. How is that?

A. We changed the oil burner once at Mr. Gilbertson's request there.

Q. You changed what?

A. We changed an oil burner there at Mr. Gilbertson's request.

Q. You changed an oil burner at Mr. Gilbertson's request? A. Yes.

Q. You placed an oil burner in this boiler——

A. That's right.

Q. ——instead of running this boiler by wood or coal or steam? A. That's right.

Q. How long did you put in time doing that, putting in this boiler?

A. That is included in that price of boiler and header.

Q. It is included in this item, setting up boiler and header? A. That's right.

Q. Where did you get this boiler originally?

A. That boiler came out of the Alaska Airlines.

Q. Alaska Airlines? A. Yes.

Q. Didn't it come out of one of these cleaning establishments?

A. It did not. The cleaning establishments use high pressure steam and those are low pressure boilers.

Q. Low pressure boilers? A. That's right.

Q. Did you get the boiler yourself?

A. I took the boiler out of the Alaska Airlines and replaced it.

Q. Replaced it?

A. I replaced it with another boiler and put that boiler down in Mr. Gilbertson's.

Q. How long had that boiler been in operation and use?

A. It had been in use a good many years. I don't know exactly how long. I never did ask them how long it had been in use.

Q. What kind of a boiler was it?

A. That is an iron sectional boiler.

Q. Did you take it to pieces in order to get it to Gilbertson's and set it up?

A. They have to be taken to pieces.

Q. Well, I am asking you if you did take it to pieces? A. Yes.

Q. And took it out of the Wien Hangar, or some place? A. Alaska Airlines.

Q. Alaska Airlines? A. That's right.

Q. And you took it up to Gilbertson's and set it up? A. Yes.

Q. Did you buy it?

A. Yes. We took it on a trade-in.

Q. On a trade-in? A. Yes.

Q. Did you test it as to its capacity to heat a building of that kind? A. Yes.

Q. Before you set it up?

A. Yes. It is more than [280] sufficient size.

Q. More than sufficient?

A. Yes, it is way over capacity.

Q. How would you describe the capacity of that boiler?

A. Well, it is figured in the number of square feet of radiation it will handle, and that boiler is capable of handling in the neighborhood of twelve hundred square feet.

Q. Well, would it have any particular designation like fifty horsepower?

A. No, it does not. Low pressure, cast-iron sectional boiler is rated in the number of square feet of radiation it will handle.

Q. This boiler you speak about that you bought from this airline outfit, that was about twenty-five years old, wasn't it? A. No, it wasn't.

Q. It wasn't. I don't think it was. As I say, I don't know, because I didn't ask them.

Q. Well, as a matter of fact, it wasn't sufficient to do the work there it was required to do?

A. It is more than sufficient.

Q. It is a sufficient heating unit in a building like the Ranch Building?

A. It will handle two buildings like the Ranch.

Q. It will handle two buildings like the Ranch?

A. Yes.

Q. And you think it was perfectly satisfactory?

A. It was satisfactory so far as size was concerned. It was satisfactory when I left there.

Q. How about this oil burner that you put in in connection with this boiler? When did you do that work?

A. I did that at the time we set the boiler up, after we had the job far enough along.

Q. Did you commence using it?

A. We used it.

Q. The burner? A. The burner, yes. [281]

Q. And where did you get that?

A. Well, as I said, there was two burners put in there. Now you will have to tell me which one you are talking about.

Q. Well, either one of them, to start with.

A. The first one put in there was new. It was bought in Seattle from LaPere and Walker.

Q. Who got that?

A. What do you mean, who got it?

Q. Did you get it or did Gilbertson get it?

A. We bought it. We did. We bought four of them at that time. We were able to get four. Oil burners were hard to get at the time, and we were able to get four of them at that time, and that was one of the four we got.

Q. Did you install that in the building?

A. Yes, we installed that.

Q. About when would that be?

A. I couldn't say off-hand when it was.

Q. You couldn't even make a guess?

A. Well, I would make a guess for you if you want a guess. It would be along, let me see—it would be along in November, probably the latter part.

Q. Of November? A. Yes.

Q. How long did it remain there?

A. Well, it was in there for a week or two weeks, possibly three weeks, I am not sure.

Q. Why was it taken out?

A. Because Mr. Gilbertson said it was too small.

Q. Mr. Gilbertson said that? A. Yes.

Q. What did you say about it?

A. Well, it could have stood a larger burner, that's true. However, it was doing the work at the time. It ran a good time without shutting off, and that is why he decided it was too small and he wanted it out of there. [282]

Q. What was the difference in the capacity between the first boiler you put in and the second?

A. The second one was quite a bit larger burner.

Q. Did you install that right away after taking out the first one? A. That's right.

Q. How long did that remain there?

A. Well, that was there when I left. That was in there when we completed the job.

Q. Did you furnish that boiler or did Gilbertson furnish it? A. The boiler?

Q. No, this burner I mean.

A. I furnished the burner, yes.

Q. How much did you charge for that?

A. The burner—Mr. Gilbertson and I made an agreement on the burner, and I told him at the time that the burner was an old one and that it was the only burner that was available in town. If he wanted the burner changed and if he wanted this old one that was in poor shape, I would put it in, and, at such time as he or I could get ahold of

another burner, I would allow him the price of that burner back, and that was satisfactory, the $100.00 with return guaranteed; and when we put another burner in there he was to return that burner and get $100.00 back.

Q. You mean to tell the Court now that Gilbertson directed you to put in that second-hand burner?

A. That's right. Mr. Gilbertson and I talked it over, and he told me to put it in. I told him the old burner was the only one in town available.

Q. Didn't he tell you, at that time, the burner was too old and would never do the work?

A. He did not.

Q. He did not? A. I told him that——

Q. You told him that?

A. Yes, that it was the only [283] burner available at that time.

Q. Notwithstanding that you put it in?

A. How is that?

Q. Notwithstanding that, you insisted on putting that in?

A. I did not insist on putting that in at all.

Q. But you put it in?

A. I put it in at his instruction.

Q. At his instruction?

A. Yes. He was the one who wanted it in, because the other one was too small.

Q. Now, you are sure about that?

A. I am sure about it.

Q. You first rendered a bill covering these items here to Gilbertsons, with a lot of items in the orig-

inal bill claiming that you bought a lot of things from Palfy and paid for them, didn't you?

A. No.

Q. You didn't do that?

A. You got that backwards. It was Mr. Gilbertson who bought the fittings from Palfy.

Q. Didn't you put them in the bill as though they were paid for?

A. We did not. We made credits for them. He asked us to take them back and give him a credit for it.

Q. He was the man who was directing all this business? A. That's right.

Q. You weren't using your judgment at all?

A. Mr. Gilbertson instructed me that, after he had trouble with Walker, and Walkers bill had a lot of supervision in it, if he told me once, he told me half a dozen times he didn't want any supervision on that job.

Q. Therefore you let him do just as he pleased?

A. That's right.

Q. You claim no responsibility for anything that happened; is that the situation?

A. Up to a certain point, yes.

Q. Up to a certain point. Now what point was that?

A. Well, if you care to question me on it, I will tell you where I disclaim responsibility.

Q. Well, at what point do you claim that your responsibility was discharged?

A. After the boiler was set up. [284]

Q. After the boiler was set up?

A. Because from then on he instructed me that he wanted no supervision on that job.

Q. Was there anybody else there when he said that? A. I don't remember.

Q. He just said that orally to you?

A. That's right.

Q. You got nothing in writing?

A. That's right.

Q. And at the time when he made those statements, or any statement in that connection, there was nobody present?

A. There probably was, but I don't remember who it was.

Q. You don't remember who it was?

A. There was always somebody around there when I talked to Mr. Gilbertson.

Q. Now, on page two of this statement of yours that is headed, "This cancels and supersedes all previous billings," dated February 19, you have the first item on there as one boiler, and after that in brackets, it says, "price as corrected," one boiler, $175.00. A. That's right.

Q. Now what was the original price that you had put into your bill, put into your previous bills?

A. There was an error in our other bill. The clerk billed him for $500.00, and instead Mr. Gilbertson and I had agreed on the price of $175.00 for that boiler, and the clerk misbilled him for $500.00, and that was the correction in there.

Q. How did that come to be charged as $500.00 to start with?

A. I don't know. The clerk—The bookkeeper at that time did it. I don't know why he did it.

Q. Who was the bookkeeper?

A. A man by the name of Calhoun.

Q. Is he here now? A. No, he isn't.

Q. Where is he?

A. You mean is he in town?

Q. Yes. A. Yes, he is.

Q. What did you understand by my question, "Is he here?"

A. I thought you meant was he in the room.

Q. Is that the man who works for Lavery's?

A. Yes, [285] that is the man.

Q. Did you ever ask him why he charged $500.00 for that item? A. No, I didn't.

Q. You didn't?

A. No. I believe when we corrected that, I believe he had left us.

Q. How much did the boiler cost you?

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial.

The Court: The objection will be overruled.

Mr. Bell: Exception.

Q. You may answer.

A. The boiler cost $175.00.

Q. $175.00?

A. I might qualify that statement by saying that the boiler that was put in to replace that one cost $175.00, and that was taken on the trade-in.

Q. Now, just state that again, will you, Mr. Lane?

A. The boiler we bought to put in the Alaska

Airlines to replace that one cost $175.00, and we took that one in on a trade-in, and, therefore, sold that one for $175.00.

Q. I see. Further down on page two of this bill which says, "This cancels and supersedes all previous billings," there is an item of one reducer, in brackets, "incorrect charge," $3.00. How do you interpret that? What does that mean?

A. There is a credit there of $3.00. The reducer cost thirty cents, and there was an error there in extension. In making the extension, the bookkeeper put it down as $3.30, and, in going over that bill, why Mr. Gilbertson and I saw that. In fact, Mr. Gilbertson saw it and called my attention to it, so we credited it back $3.00 to make the price correct.

Q. Did I understand you that you first put in one certain boiler and then took that out and put in another certain boiler? A. No.

Q. You didn't do that? A. No.

Q. Oh! I thought in the statement you made just recently you spoke about two boilers.

A. No. I only put in one boiler. [286]

Q. Just the one boiler? A. That is all.

Q. Well, that boiler that you put in, do you know where it is now? A. No, I don't.

Q. Weren't you ever notified by Mr. Gilbertson—— A. No.

Q. ——as to where it is? A. No, I wasn't.

Q. You were not. Was your partner, Reed?

A. If he was, he said nothing to me about it.

Q. He said nothing to you about it. Don't you know it was taken out of there and set down outside the Ranch building, and Gilbertson notified

you it was there and, if you wanted it, to come take it away, and you never came after it?

A. I never heard anything about it.

Q. You never heard anything about it?

A. No.

Mr. Clegg: That is all.

Mr. Bell: I believe that is all.

Then Mr. Henry Reed testified that he was a member of the partnership of Reed and Lane, had been at all times since the inception of the firm, he did some of the plumbing out at the Ranch, the rest was done by his employees, he did all of it but five hours, that he charged for the work at the regular and customary charges at Fairbanks Alaska, at that time. He furnished some of the material and some fixtures and charged for the material and fixtures at the customary and regular charge being charged at Fairbanks, Alaska, at that time. That after the job was completed he had conversation with George Gilbertson.

These questions were asked and the answers given as follows:

Q. There is a credit of $250.00 on here for returned material. What was that for?

A. Well, originally, that was for the purchase of a bathroom set, a complete bathroom set with pre-war fixtures. We purchased the material from the Graehl Circle Bar for $250.00, and we quoted the price to George, and he was tickled to death to get it, and he paid for it at that time. He [287] was contemplating putting in the plumbing in a house adjoining the Ranch.

Q. Now, did he ever take those bathroom fixtures? A. No, sir, he didn't.

Q. And is that what that credit of $250.00 is for?

A. That's right.

Q. Now, was the plumbing work that you did there all right? Was it finished when you got done with it, the part you did? A. Yes.

Q. And are the charges you made there correct?

A. That's right.

Q. Now, have you ever talked to him about this bill that supersedes all previous bills? Are you using it, Judge? A. I have a copy, sir.

Q. We have a copy. You may keep that. Did you ever go over that bill with George Gilbertson yourself? A. Yes.

Q. And at what time did you go over it with him?

A. I believe that that was in January, sir. No, I take that back. I think it was after February.

Q. After February. And what was your purpose in going over it with him?

A. There was a lot of errors and mistakes. If I might go back a little bit——

Q. Yes, go back.

A. During the war—at that time, when the war was in progress, bookkeepers were at a premium. The government had taken all clerical help to speak of, and we had a man working for us by the name of Walt Calhoun, and Walt was not a full-fledged bookkeeper. He never professed to be, but he did the best he could, and Walt had taken care of the books to the best of his ability. However, there was

mistakes, which anybody is liable to make. These mistakes were taken up with Mr. Gilbertson by Mr. Lane, and the time cards and everything were gone over, and I went out to see George and Harvey about collecting the account, and at that time we went over it. [288]

Q. Was there any—was there something in there, any plumbing work in there, that he ever kicked about at all, or the charges for the plumbing, at that time?

A. I don't recall that George ever did complain about the plumbing.

Q. He didn't to you, anyway?

A. He didn't to me at all, no.

He then testified that he employed a lawyer and filed a notice of Contractor's Lien, the lien was then identified and introduced without objections which is shown on pages 144, 145, 146, and 147 of the transcript and made a part of this Bill of Exceptions by references; that he had been paid nothing since the filing of the lien; that the amount set forth in the lien was the correct amount of the indebtedness from George Gilbertson and Harvey Gilbertson doing business as The Ranch to himself and partner after all proper credits were given.

On cross-examination he testified that Calhoun was the bookkeeper, he didn't profess to be a full-fledged bookkeeper.

Then these questions were asked and these answers given, as follows:

Q. What difference was there in the bills that

your furnished to Gilbertsons for this work and the revised bill that you say supersedes all others?

A. There is about $400.00, sir.

Q. Do you mean you increased the amount that you claimed to be due $400.00, or reduced it?

A. We reduced it, sir.

Q. Isn't it true it is greater than the original bill you sent him? A. No, it isn't.

Q. Did you ever examine the original statement? A. Yes, I have examined it.

Q. And checked it? A. Yes, sir.

Q. I see this statement of account here, which commences November 8 and finishes December 15, is that the one you checked?

A. This is the first bill that was presented, all of our first invoices, sir. This is the first statement that they [289] received.

Q. That you sent?

A. Yes. They were sent all of our first invoices.

Q. You said something in your testimony already about checking this first statement, or checking any statement. Is this the one that you checked?

A. That is the statement that George Gilbertson and Mr. Lane checked.

Q. There is a notation there once or twice, maybe oftener, "checked Geo." Do you know whether that notation on that first bill was put on there by your firm or Gilbertson's firm?

A. It wasn't put on by our firm, sir.

Q. Would you say it was a correct statement?

A. No. No, sir, I wouldn't. That is where the errors were, in that first bill.

Q. Well, do you know, of your own knowledge, when you commenced to work on this project for the Gilbertsons? What date was it, if you know?

A. The only way I have is of checking back, sir. I could check back on the time cards.

Q. Sir?

A. The only way I could tell you would be from my time cards. I could tell you in a minute. It is too long ago to remember the exact date.

Q. Do you know when you quit?

A. We had a small job out there, and it wasn't carried on in consecutive days, so far as my work was done.

Q. Now, I call your special attention to the original bill that you say was tendered and contained errors to the fact that it shows that the last entry apparently made by you against Gilbertson is dated December 15th. Do you know whether that is true or false?

A. No. There was work performed after the 15th.

Q. There was. What was the character of it?

A. I think that was a matter of some——

Q. Sir?

A. I think that was a matter of a range hood.

Q. Range hood?

A. In the kitchen upstairs.

Q. The bill shows there was a range hood, doesn't it? [290]

A. That is true, sir. That was the order for the range hood that was made out on that invoice. The work was never completed until late in December.

Q. Here is an invoice for the installation of the range hood, and it gives the date it was finished. It started 11/3 and finishes 12/13.

A. Which bill are you looking at, sir?

Q. I am looking at this one that says, "Installation of range hood," dated January 8, 1945. It is attached to this general bunch of statements here.

The Witness: May I ask a question, your Honor?

The Court: Surely.

The Witness: Were these time cards entered as an exhibit or not?

The Court: They were marked as an identification. You may refer to them.

A. In refreshing my recollection, I would like to correct my statement about the range hood. It wasn't a range hood. It was making floor flanges for the dance hall, rails in the dance hall.

Q. Rails? A. Yes, sir.

Q. Where does that show on this original bill?

A. They don't have all of them there.

Q. They don't have all of them?

A. No, sir.

Q. Well, what is overlooked?

A. Do you have an invoice 350, number 350?

Q. Wait a minute. There don't seem to be any numbers on here.

A. On the top, sir, in the left-hand corner.

Q. Yes, I got 350.

A. Do you have one for railing?

Q. Railing, did you say?

A. Yes. It would be for railing; it only shows material, but that is what it was made up for.

Q. Will you look there and see if you find it on there? That is 350, isn't it?

A. Yes. Right here, sir—this material here. However, the date of the time card is later than that. [291]

Q. What did you furnish—what I am trying to get at is what did you furnish or do after the date of December 15th or 16th? A. It is right there.

Q. It doesn't show that.

A. It does, sir. It shows labor, and it shows also material.

Q. But you were talking about railing.

A. This material was made up into a rail, and that is where the labor was entailed in it.

Q. Anyway, it was all concluded on December 15th, presumably, from this bill.

A. That is right, presumably from that bill, but the time cards were later than that. The work was done later than that.

Q. Do you have the time card?

A. There is one right there on the 20th.

Q. Was there anything after the 20th?

A. I think there is work on the burner after the 20th. There is one on the 24th.

Q. "Service call on burner labor, one hour." You mean they called up and said there was something wrong with the burner? A. Yes, sir.

Q. You sent a man out there and fixed it, and that is charged up as a part of this contract?

A. That is part of the bills, sir.

Q. Well, do you know anything about what arrangement was made between your firm and Gilbertsons, the defendants, with reference to this contract?

A. We never had a contract, only a verbal agreement with them.

Q. Just a verbal agreement. Didn't you have a cost-plus contract, or some kind of a contract?

A. I don't recall ever having that. They just wanted us to do the work. Under ordinary circumstances, we do that work under time and material.

Q. Didn't you say at one time it was a cost-plus contract?

A. No, sir. We don't operate on a cost-plus basis. [292]

Q. You don't operate on a cost-plus basis?

A. No, sir.

Q. Whatever contract you had with the Gilbertsons in connection with the installation of this heating plant on the Ranch, did it naturally follow that you could charge up to it this call on December 24th as part of the contract?

A. Oh, yes, sir.

Q. You are certain about that?

A. Yes. Any time you get an order through your office, through our office over there, we make a service charge from the shop, which is allowable to us and that is charged from the time we leave the shop until we get back.

Q. Well, would you call it part of the original contract that was entered into to install that plant?

A. We never had a contract. All we had was a time and material job.

Q. Time and material job. So anything that shows up here in the papers, on the pleadings here, that you did have a contract is the bunk?

A. Well, if there is a written contract on it, I never saw it.

Q. You don't mean a written contract necessarily, do you? Any kind of an oral contract would be just as good as a written contract, wouldn't it?

A. We never had an oral contract so far as a set price is concerned. We did have an agreement with the man to do it on a time and material basis. That is an oral agreement.

Q. Wouldn't you call that a contract?

Mr. Bell: I object to that are argumentative.

The Court: I think he is entitled to find out what the witness means by a contract as claimed by his testimony.

A. I would say it is what we could call an order.

Q. An order?

A. An order placed with us to do a certain amount of work, there was not being any question asked as to what the cost will be. To define it, our shop operates—the way we do business over there, if we have a contract, we specify what we [293] will furnish; ordinarily the amount of time it will take for a certain amount of money to be paid a certain way. If we don't have that written agreement, we have an oral agreement that the cost will not exceed so much. If we don't have that, our work is all charged out on a time and material

basis, and I don't really believe it constitutes a contract so far as the plumbing shop is concerned, because he could have stopped or terminated that contract any time he saw fit. It doesn't hinder him from doing as much work as he wants to do on it. Therefore, the responsibility as to the workmanship is ours, but the amount of work is his.

Q. Well, you are prepared to say, now, that you didn't have any contract?

Mr. Bell: I object to that. It is argumentative. He has explained exactly how he was employed, and that is for the court to determine. That is a legal question.

The Court: The objection will be overruled.

Mr. Bell: Exception.

Q. Is that your contention?

A. What was the question again, sir?

Q. I said, your contention is—I don't know exactly what the question was, but I will just revamp it and reframe it. Your contention is that you didn't have any contract. Is that right or wrong?

A. I would say that we had an order, what we could classify as an order, from the Gilbertson brothers to do a certain amount of work. There was no written contract, no.

Q. I call your attention to paragraph four of the amended complaint in this case, which apparently you signed on the 9th day of May, 1945, as follows: "Plaintiffs—that is you—further alleges that on or about the 7th day of November, 1944, the defendants, George Gilbertson and Harvey Gil-

Bertson, joint owners and partners doing business as the Ranch, employed these plaintiffs to do certain plumbing, steam fitting and sheet metal work and to furnish certain materials to be used in the buildings and improvements situated upon the hereinafter described premises and property which improvements were then being constructed, remodeled and repaired, [294] and the defendants George Gilbertson and Harvey Gilbertson orally agreed to pay therefor, the customary and reasonable price for the material furnished and the labor furnished and performed. At the special instance and request of the two last named defendants, the plaintiffs did and furnished certain work and labor and certain material in the installation and finishing of the improvements and building on said property and that continuously from the commencement of said work and week by week and month by month, these plaintiffs expended and furnished labor, skill and material which were incorporated in the buildings, improvements, and structures on the above-described real estate; that all of said labor, skill, and materials were incorporated in said structures." Do you want to see this before you answer the question. I am reading you what was set forth here in the amended complaint, signed by you on the date I mentioned. Would you like to see it?

A. No, that is all right, if you read it.

Q. I just did. A. That is right, sir.

Q. With some labor on my part. Now having your memory refreshed by the reading of this statement in the complaint, it is your statement now

that there is, or was not, any contract between you and the defendants with reference to this work?

Mr. Bell: I object to that as having been asked and answered.

The Court: Objection sustained.

Mr. Clegg: That is all, Mr. Reed.

Mr. Bell: That is all.

The Court then recessed and after lunch Mr. Reed was recalled and testified that "When we talked about the bill there was no objection made to the plumbing at that time and he said 'We will skip that, because it is all right. There are only a few hours on it.'" And on recross examination the following questions were asked by Mr. Clegg, and answered by the Witness. [295]

Q. What plumbing are you referring to?

A. The plumbing we did at the Ranch.

Q. All the plumbing? A. Yes.

Q. Including this railing you said you put around the floor, or segregated the dancing space from some other part of the building? Is that plumbing work?

A. Well, it could either be done by a pipe fitter, steamfitter, or plumber—anybody familiar with stock and dies could do that work.

Mr. Clegg: That is all.

Mr. Bell: That is all then.

Warren A. Taylor was then called as a witness and testified that he was a regular licensed lawyer for the Territory of Alaska, practicing at the bar, was familiar with the reasonable and customary

charges for Attorneys in handling cases before this Court. That he understood that this was a lien case; that the amount involved was $1429.76, and one of the ordinary and regular cases for the foreclosure of liens; that ten or fifteen per cent would be a reasonable fee; that sometimes cases of this kind are settled upon the basis of $100.00 and ten per cent of the amount involved and the amount recovered.

Then George Gilbertson, one of the Defendants, was called on behalf of the Plaintiff and testified as to the ownership of the property involved which is set forth in pages 46, 47 and 48 and the plaintiffs rested and the defendant moved for non-suit which proceedings are found on pages 48, 49, 50, 51 and 52 of the Transcript of Testimony which is as follows, to-wit:

Mr. Clegg: If the Court please, at this time, on behalf of the defendants and each of them, we move for a non-suit, this action being what is ordinarily called an action for the foreclosure of a lien and is based entirely upon the lien that has been introduced in evidence and testified to by certain witnesses *which has been introduced in evidence and testified to by certain witnesses* and which has been received in evidence. We ask for [296] the nonsuit upon the ground of failure of proof, it having been alleged in the complaint that the last work and/or materials furnished by the plaintiffs was furnished on the 24th day of December, 1944, and the evidence of the plaintiffs having shown conclusively that the work terminated and the furnishing of

materials terminated on the 15th or 16th day of December, and the lien notice introduced in evidence shows that it was not filed or recorded in the office of the recorder of the Fairbanks Precinct until the 21st day of March, which was several days beyond and above the prescribed time of ninety days following the termination of the furnishing of the labor and the furnishing of materials, and, therefore, the filing of the lien at that particular time is a void act on the part of the plaintiffs and was outside of the scope of the law governing the foreclosure and fastening of liens upon real property as established by the law of Alaska. There fore, no foreclosure can be predicated upon the lien itself, as it is clearly outside the time limit given by the law for the filing and recording of liens.

Mr. Bell: Your Honor, he admits that the last material was furnished specifically in his pleading on the 23rd day of December in paragraph 2. In paragraph two of his answer he admits that it was that day, and the evidence shows that there was material furnished on the 23rd and the 24th both. Mr. Reed showed some little thing on the 24th even, but the 23rd was the last matter that was stressed, except some small matter on the 24th, but he admits it was furnished on the 23rd, and that, of course, puts it within the period.

Mr. Clegg: If your Honor please, I would like to add a few words in explanation of that and in contradiction of it. It is true, as Mr. Bell states, that the plaintiffs, having alleged that the work

ceased on the 24th of December, we admit it. We admit it clearly under the mistake and misapprehension and misinformation with reference to the proof. Now they put a witness [297] upon the stand here, and he introduces the absolute records kept by the plaintiffs in this case which shows conclusively and the testimony of the witness, in addition, shows conclusively that there was a hiatus between the 15th and 16th of December up until the 23rd or 24th day of December, which can't be shown except by their own records, and we assumed, of course, that when a matter of that kind is placed in a pleading that it states the truth. Therefore, without wishing to call for an explanation of the books, or, showing of the books of the plaintiffs, the defendants erroneously admit the allegation in the complaint, that the work terminated and the materials caused to be furnished to this property on the 23rd of December; but we have now, your Honor, the exact testimony of the people who were supposed to know and who have kept a record of it, and, by their own testimony and by their records, they show that at the time this alleged lien was filed that it was outlawed, and we certainly are not to be prohibited by insisting upon a substantial matter of that kind by an erroneous admission. It is clearly erroneous. It isn't the truth, and that is what we are here for—to ascertain what the truth is, so we ask the court to allow us to amend the answer, if necessary, in that regard, and, instead of admitting that the work ceased, let us stand upon the proposition shown by their own evidence here

that the work had ceased long prior to the actual time and legal time fixed by the statute for the filing of this lien.

The Court: You wish to amend that part of your answer, do you?

Mr. Clegg: Yes, sir, and show that we deny that it was filed on the 23rd or the 24th and insert in place of it the date shown by their own records—that it ended and terminated on the 16th of December instead of the 23rd or the 24th, whichever the pleadings show.

Mr. Bell: I object to the amendment.

The Court: It may be amended to conform to the evidence, [298] exception allowed Plaintiff.

Mr. Bell: Your Honor, the evidence—I want to call your attention to that—the tickets show that work was done on the 24th and he testified to it.

Mr. Clegg: Your Honor, he said he got a service call by telephone to come out there and look at it, and they went out there and charged for one hour's time. That had nothing to do with the original agreement, nothing whatever.

Mr. Bell: He went out there and did the work on the 24th. He went out and fixed something that wasn't working.

The Court: That would be just a repair job. That wouldn't be part of the original contract.

Mr. Bell: The other was within the time. The 23rd is within the time, the material and work furnished on the 23rd.

The Court: The only other, as I recall it, was

something on the 20th, the 16th, and the 20th is the very last.

Mr. Bell: Just wait a minute. Let me look at those cards as to dates—Here is one for the 27th.

The Court: There was no evidence about it.

Mr. Bell: I offered this, though, in evidence.

The Court: It doesn't make any difference, though, it wasn't received.

Mr. Bell: Now, Your Honor, may I reopen my case just to offer these particular cards?

The Court: I will permit you to reopen your case.

Thereupon Joseph Lane was recalled and testified as follows:

Q. I hand you a ticket, which seems to be an invoice marked Plaintiffs' Identification No. 1 in this case, and I will ask you to state if you know who made the call or did the work on that?

A. I did the work.

Mr. Clegg: Just a minute. We object to this, your Honor, as supplementary to the prima facie case made by the plaintiffs and serves to contradict their own testimony and is [299] not permissible as rebuttal evidence, because there is no foundation laid for it, and otherwise it is irrelevant, incompetent, and immaterial.

The Court: No foundation has been laid for the use of any such memorandum yet, exception allowed Plaintiffs.

Q. Well, is this an original, a part of the original records in your office? A. Yes.

Q. Is that a part of the bookkeeping, general bookkeeping system of your office? A. Yes.

Q. Now, when and under what circumstances are cards like that made?

A. They are made by the man, whoever did the work, at the time the work was done.

Q. And who did the work on the date indicated at the top of this time card? A. I did it.

Q. Did you date it? A. Yes, I dated it.

Q. Is it in your handwriting? A. Yes.

Q. Now, then, did you at that time go upon the premises of the defendant at the Ranch and do work there? A. Yes.

Mr. Bell: Now, I offer this in evidence.

Mr. Clegg: Just a minute, your Honor. Well, that is the same thing that was introduced here by Mr. Reed: call on burner, labor, one hour, service; it says "service," and it is dated 12/24/44. That is the very identical thing Mr. Reed was talking about. We ask that it be excluded, your Honor, and disregarded entirely on the ground that it is incompetent, irrelevant and immaterial and has already been testified to by a witness on direct examination, by Mr. Reed by direct examination and cross-examination.

The Court: Objection sustained, exception allowed Plaintiff.

Q. Mr. Lane, what was the occasion for your going out to the Ranch on the 24th day of December, 1944?

A. I was called out [300] there because they were having trouble with the oil burner.

Q. Is that the oil burner you had put in?

A. That's right.

Q. Was that a part of the regular contract work that you had done for them?

A. Well, ordinarily a service call, a service charge, wouldn't have been made there, but, due to the fact that they had taken that burner out themselves and worked on it themselves a few times, we made a service charge on that account, and it was part of the original work.

Q. And did you do the work after you got out there? A. I did, yes.

Q. Have you ever been paid for this work?

A. No.

Q. And this is included in the work that you and George Gilbertson talked over at the time you were going over those tickets? A. That's right.

Mr. Clegg: We object to that as irrelevant and immaterial.

The Court: Objection sustained, exception allowed Plaintiffs.

Q. Was this ticket present when you and Mr. Gilbertson, George Gilbertson, were going over the charges and the dispute between you as to the charges and the labor done out there?

A. Yes, it was there with the other time cards.

Q. Was it one of the cards that was agreed upon by you and Mr. Gilbertson at that time?

Mr. Clegg: I object to that as incompetent, irrelevant, and immaterial, not proper direct examination at this time, and it is outside of the issues.

The Court: I think it is also incompetent. I will sustain the objection, exception allowed Plaintiff.

Q. You did the work on the 24th day of December, 1944, for the Defendants in this case?

A. Yes.

Q. And that was the occasion for making this particular charge? A. Yes. [301]

Mr. Bell: We reoffer the card in evidence.

Mr. Clegg: We object to it on all the grounds already stated, your Honor, and that it is not proper rebuttal evidence and that there is no foundation laid for its introduction. It has already been testified to by one of the witnesses on the case in chief. It is incompetent, irrelevant and immaterial.

The Court: Objection sustained, exception allowed Plaintiff.

Mr. Bell: Your Honor, may I say this, please: It is not rebuttal evidence. You allowed me to reopen my case in chief, and this is evidence after you have permitted an amendment in the answer.

The Court: I am not ruling on it on the ground that it is rebuttal. I ruled on it on the other grounds.

Q. Was that work done under the same terms and the same circumstances as all the rest of the work done out there? A. Yes.

Mr. Bell: That is all.

Then on cross-examination Mr. Lane testified as follows:

Q. It was done just about as well as the rest of the work was, too, I suppose?

A. Are you competent to judge?

Q. I am asking you that question and I ask you to answer it.

A. I didn't hear a question. I heard a statement.

Q. Will the reporter please read the question?

(The following question was read by the reporter: It was done just about as well as the rest of the work was, too, I suppose?)

Q. You didn't understand that to be a question?

A. No, I didn't.

Q. You thought I was just talking to hear myself talk, is that it?

Mr. Bell: I object to that as argumentative.

The Court: Objection sustained.

Q. What did you do now—Explain to the Court now what you did in connection with this transaction. A. I fixed an electrode in there. [302]

Q. How did you fix it ?

A. I fastened it back up; taped it back in there.

Q. Taped it back in? A. That's right.

Q. And that was a week after you had been out there before? A. Approximately.

Q. Approximately? A. Yes.

Q. What? A. Approximately, yes.

Q. And you wrote down, you said, this memorandum on this time card? Did you say that?

A. Yes, I wrote it.

Q. You wrote the word "service" on there, did you? A. That's right.

Mr. Clegg: That's all.

The following proceedings were then had:

Mr. Bell: Your Honor, I reoffer in evidence, now, all of the tickets, the original time cards, that I have offered before a time or two, on the identification that they have had now.

Mr. Clegg: We renew and ask the privilege of renewing our objections to this offer as it was originally made and originally objected to, and upon the further ground that the main case of the plaintiffs is closed, and the offer now comes too late.

The Court: Objection sustained.

Mr. Bell: Exception. That is all.

The Court: I will overrule the motion for a nonsuit for this reason: that although I believe the evidence failed to prove a lienable claim, they nevertheless would be entitled to a money judgment, even though the lien failed, so that is the ground I will overrule it on.

Then George Gilbertson, one of the defendants, was called and testified in defense that he is in the hotel business now; he has lived in this vicinity about eleven (11) years, became acquainted with the Plaintiffs about the time he hired them to put the plumbing and heating in; the Walker Construction Company, through [303] Mr. Walker brought Mr. Lane out there and introduced him as a plumber and steam fitter. We had the job and we wanted to get done so we hired Lane and Reed and they agreed to put the job in. That he had a boiler out there and some radiators and fittings that we had bought down at a place that had burned up. That Mr. Lane told us that the boiler was not

big enough but he had one that he would sell us: "So Harvey and I go down and look at it with him. He wanted $175.00 for it, but when we come to pay for it, why it was charged up as $500.00." This conversation was with Lane. I told him we wanted a heating plant, we wanted a good plant in there. A plant that would keep it warm. It was suggested that a hot water system be used to start with. Mr. Lane claimed—electric unit heaters "That steam or water, whatever you are using, goes through the fans, through the tubes and the fans only—he claimed a hot water system wouldn't work in those unit heaters. So we put steam in there and we got the steam plant sitting out there now. It don't work. It couldn't keep the place warm. It was put in by Lane and Reed. They put a new oil burner in to start with. He was supposed to put in an outfit that would work. It didn't work. We paid part of it at the time and a little here and a little there when they needed some money.

Then this question was asked:

Q. Well, on what basis was he to be paid?

A. Well, there was nothing stated about that. (Page 60 of Transcript.)

Q. There was nothing stated?

A. Nothing.

Q. Was it a cost-plus basis?

A. Well, I heard Mr. Lane say that this morning. That is the first I knew of it.

Q. What did you understand it was?

A. I understood there was a heating plant to be put in there. So far as I know, when it was

through and finished, and if it was a good job, I would pay for it.

They put the boiler in there. It took about six weeks to. [304] Some men came out there and worked for a short time and go back to town. We had four or five carpenters working out there; they had us tied up all the way through. It was in December when they got the plant working. I could not tell you the date. It never did heat the place. They had an oil burner in there. From what we understood, it was too small. They took it out and put another one in there. I know they had calls on it to go out and repair it but they never did repair it. Harvey bought another outfit from Wilbur's and put another heater in there, or oil burner. (Page 62 of Transcript.) Lane and Reed had two of them. They put a new one in to start with and it run steadily; it didn't cut off so they put this old one in, an old worn out one. Apparently the pump didn't work, and it would explode. It sooted the whole place out there so then Harvey called up Wilburs. He called Lane and Reed. They were out I guess, a time or two. Mr. Reed was out—as a matter of fact, I believe he came down to the hotel to see me and we went out to the Ranch. I believe it was in January, to see if they couldn't make a settlement. Mr. Reed said he would go in and see his partner; that he would rather do that than go to Court. The next day he slapped us with the lien. He never did come back after that. It never worked properly.

These questions were asked and these answers given:

Q. The question is, George, do you know of your own personal knowledge what was the condition of this heating plant at that time?

A. Well, it was unsatisfactory.

Mr. Bell: I move to strike that.

Q. Answer "yes" or "no." Do you know, or don't you know? A. Yes, I do know.

Q. All right. Tell the Court now, what condition it was in.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial, and he has not been shown to be qualified to answer. [305]

A. Well, this oil——

The Court: Just a minute. I don't know just what time you are referring to, Judge Clegg.

Mr. Clegg: The time that he said that they called up Wilbur, at that particular time, because the plant was not working satisfactorily. Now, what time was that?

The Court: Has he shown that a different one was put in?

Mr. Clegg: Yes, he answered that question.

Mr. Bell: Your Honor, I believe Mr. Clegg is wrong. I objected to that question, and you sustained it.

The Court: I don't think there has been any testimony that this witness knows when it was that his brother did call up Wilbur—that he knows of his own personal knowledge.

Q. Do you have any idea when that was?

A. I have no idea. I couldn't say.

Q. Was it before Christmas, or after Christmas?

Mr. Bell: I object to that. He has already answered that he doesn't know.

The Court: Objection overruled.

Mr. Bell: Exception.

A. I wouldn't say.

Q. You wouldn't say. Well, when was it that you found out that it wasn't working correctly and properly?

Mr. Bell: I object to that as assuming a fact that is not in issue.

The Court: Objection overruled.

Mr. Bell: Exception.

Q. Can you state about what time?

A. The date they put steam in the boiler.

Q. The date they put steam in the boiler. Well, they afterwards transformed it into an oil burner, did they? A. It was an oil burner then.

Q. Huh? A. It was an oil burner then.

Q. An oil burner then. What we want to find out, now, George, is what you know about the defects, the unsatisfactory condition, of this heating plant to do the work it was supposed to do. What was wrong with it to your own knowledge?

A. It wouldn't put out the heat for that building out there. It sooted the whole place up—upstairs, downstairs—and all through.

Q. How long did that continue?

A. Until Wilbur put the new oil burner in there.

Q. Did you funrnish the oil burner, or did Reed and Lane furnish it, or did Wilbur furnish it?

A. The last one that went in there, Wilbur put in there.

Q. How is that?

A. Wilbur put the last one in.

Q. Did you furnish it?

A. Harvey did. He bought it from Wilburs.

Q. But Reed and Lane didn't furnish it?

A. No, they didn't.

Q. Well, did that, or did it not, correct the defects in the previous oil burner?

A. It kept the soot down.

Q. It kept the soot down?

A. It didn't soot the place up any more.

Q. Is that the one that is in there now to your knowledge?

A. That oil burner is in that boiler right now, in another boiler.

Q. In another boiler? A. Yes.

Q. Who furnished that other boiler?

Mr. Bell: I object to that as incompetent, irrelevant and immaterial and not within the issues in the case.

The Court: Objection overruled.

Mr. Bell: Exception.

A. Through the Wilson and Wilcox plumbing concern here in town. [307]

Q. What did they have to do with fixing the heating plant, if anything?

A. They changed the whole works around, put in new fittings and a new boiler.

Q. Is that the outfit that is in there now, the heating outfit?

A. That is the one that is in there at the present time.

Q. What did you say their names are?

A. Wilcox and Wilson.

Q. Wilcox and Wilson?

A. I think that is their names.

Q. Huh? I am quite sure that is their names —yes—Tommy Wilson and Whitey Wilcox; I don't know his first name.

Q. Now, just describe it, if you will, what was the character of the damage to the building caused by these previous burners?

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the issues here.

The Court: I think that is without the issues, isn't it? You didn't ask for special damages.

Mr. Clegg: We don't ask for any special damages, but I wanted to inform the court as to the character of the damage, or destruction, which those burners caused to the interior of the building, being the burners that were installed by the plaintiffs in the action, just generally. I don't want to go into the details of it, but I would like to show that it was something more than a mere temporary and trivial destruction, item of destruction.

The Court: Very well, I will permit to you to show it.

Mr. Bell: Exception.

Q. Just generally speaking.

A. I understand it cost about $1000.00 out there to wash the walls.

Mr. Bell: I move to strike what he understands.

The Court: Motion granted. [308]

Q. Just describe what sort of condition it was in.

A. Everything was all sooted up; it was all sooted up.

Q. What do you mean by "everything?"

A. The building, the curtains, and the clothing they had up there in the rooms, tablecloths and all linen; the whole building, in fact.

Q. What kind of linens did you have?

A. Well, it was sort of a linen for the tablecloths; curtains, and their clothing.

Q. Before this occurred, what was the condition of the interior of the building?

A. It was all new.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial, and not within the issues presented.

The Court: Objection overruled.

Mr. Bell: Exception.

A. The building was all new, all varnished.

Q. What did you have to do to get rid of the soot, if anything.

Mr. Bell: I object to it for the same reason.

The Witness: We had to wash the whole interior of the building.

Mr. Bell: And now I move that the answer be

stricken. It was given before the court had an opportunity to rule on the objection.

The Court: The motion will be denied.

Mr. Bell: Exception.

Q. You wait a minute before you answer to give Mr. Bell a proper and full opportunity to make objections and don't answer then before the court rules on them, so we will get along smoother and better all around. You said you had to wash the walls, or something, did you not?

A. Well, yes, they had to wash the walls.

Q. What sort of a job was that? [309]

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the issues.

The Court: The objection will be sustained.

Q. Well, did you have to employ any help to do that?

A. I believe we had about three men out there working.

Mr. Bell: I move to strike that. He said he believes.

The Court: Motion sustained.

Q. Do you know whether you did or not?

A. I know we had them working at washing the walls.

Q. How many people?

Mr. Bell: I object to that unless he knows how many people or who they were.

The Court: I will sustain the objection.

Q. Do you know who they were?

A. No, I don't know. I know the one man was Mr. ——, and he had a couple of native women

out there the day I was out there. The one day I was out there there were three. How many we had altogether, I couldn't tell you.

Q. Now in order to clean the place up, was it much of a job?

A. Well, yes. It is a—It is a pretty big job.

Q. How much did it cost you?

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the issues.

The Witness: It didn't cost me anything. Harvey paid for it.

The Court: Objection sustained.

Mr. Bell: I move the answer be stricken.

The Court: It may be stricken.

That Reed and Lane billed out the boiler at $500.00, and afterwards changed it to $175.00 as previously agreed upon. "My brother and I went down to Reed and Lane Plumbing [310] Shop and asked him about this $500.00 for the boiler" and "Mr. Lane denied that he agreed to let us have it for $175.00 so Harvey proceeds to tell him, he wants to know if he went insane, if he couldn't remember the deal we made.

"I never agreed to the correction of the bill; they were going to revise the bills which they did, and they came out more than they were originally. We never did accept the job as finished. We were dealing back and forth, they wanted to force us to the issue on it, and we wouldn't settle with them until they put the heating plant in shape and they never did. Mr. Reed said, "I will grant you took an awful beating here. I will see if we can get

you a new oil burner." That was in January or February some time.

The following questions and answers were given:

The Court: It may be stricken.

Q. Can you briefly itemize the defects in this heating plant as it was left by Reed and Lane?

A. Its defects?

Q. Yes.

A. We had oil burner trouble all of the time.

Q. What about the pump?

A. Well, there was no pump. The pump on the oil burner wasn't working. I guess it is worn out. The oil burner man tells us——

Mr. Bell: I move that be stricken, what somebody else told him.

The Court: It may be stricken.

Q. If there is anything you can state about it within your knowledge, I would like you to inform the court.

A. Well, it had blown the doors off the boiler.

Q. It had blown the doors off the boiler?

A. A number of times.

Q. Huh? A. A number of times.

Q. A number of times. What did you do with reference to repairing it?

A. Well, that Montgomery was in charge of the day shift there, my clean-up man, and he would call [311] up later in the week——

Mr. Bell: I object to him testifying about a conference, about somebody by the name of Montgomery.

The Court: Objection sustained.

Q. Do you know what we are talking about here, of your own knowledge? A. Yes, I do.

Q. Well, did they do anything about repairing it?

A. Well, they worked on it, but never repaired it.

Q. They worked on it, but never repaired it. Now, where is this boiler you are talking about now?

A. It is sitting out there by the side of the building.

Q. Did you, or your brother, to your knowledge, notify Reed and Lane about it?

A. I understand Harvey went down and told them to come down and take the boiler.

Mr. Bell: I move to strike what he understood.

The Court It may be stricken.

Q. Did you do anything personally?

A. I never did nothing in regards to that, no.

Q. Well, Harvey is right here? A. Yes.

Q. The burner as well as the boiler is outside?

A. They are both sitting inside.

Q. They never came after them?

A. They never did.

Q. So far as you know?

A. They hadn't up 'til last night.

Mr. Clegg: That is all.

Mr. Bell: I move to strike all of his testimony about the boiler not working, the burner not working, and the sooting of the place, for the reason that it is outside of the issues, and there is no dispute, there is no contention that it was a contract

to do anything except furnish some labor and material; and this is not defensive matter, because if they had made a contract to do some particular thing for a certain amount, it would be an implied warranty that it [312] would work, but there is no testimony of any implied warranty, and I move to strike that part of the answers.

The Court: Motion denied.

Mr. Bell: Exception.

And on cross-examination he testified as follows:

Q. Mr. Gilbertson, you say you went with Harvey to see this boiler before you put it in out there?

A. Yes, I did.

Q. Where did you go to see it?

A. It was laying down by Lane and Reed's plumbing shop.

Q. Now what was the occasion for going there to see this boiler?

A. Because Mr. Lane told us to come down and look at it.

Q. Did he tell you it was an old one?

A. He did. We could see that.

Q. It showed its age there, didn't it?

A. Well, I don't know nothing about how old it is.

Q. You are a steam fittter, aren't you?

A. I was about fifteen years ago.

Q. You were in good standing as a steam fitter?

A. Yes.

Q. Now, when you saw this boiler, he offered it to you for $175.00, didn't he? A. He did.

Q. What would a boiler like that new be worth up here in Fairbanks at that time?

A. At this time of the year?

Q. No, at that time you were talking to them, that they were talking to you, down there?

A. I couldn't tell you.

Q. It would be worth a couple of thousand dollars, wouldn't it? A. No, absolutely not.

Q. Well, what would it be worth, in your opinion? A. I don't know.

Q. It would be worth a great deal more than $175.00 [313] wouldn't it?

A. If it was new, perhaps it would.

Q. Now, did he tell you at that time that this was a second-hand boiler and where he had gotten it?

A. I understood it come out of the Star Airlines Hangar.

Q. Now, it was pretty near impossible at that time, Mr. Gilbertson, to get new equipment here in Fairbanks, wasn't it?

A. We had a boiler out there to put in, and Mr. Lane said it wasn't big enough.

Q. Answer my question. It was pretty near impossible to get a new boiler here at that time, wasn't it? A. I imagine it was.

Q. And it was pretty hard to get any equipment at that time?

A. You could get any equipment you wanted.

Q. You could? A. I could.

Q. Why did you buy this second-hand boiler then? A. I believe you answered that.

Q. You couldn't get a new one, could you?

A. I didn't try to.

Q. You never tried. Now, these oil burners, at the time, they were pretty scarce at that time?

A. No, I believe there was some in town.

Q. Some in town. Now, he first put in a small burner that was a brand new one, didn't he?

A. That's right.

Q. And he told you when he put that in it was pretty small, but he thought it would work all right, didn't he? A. I don't recall that.

Q. He charged you at that time for the new burner, didn't he?

A. I paid him for it right there.

Q. How much did you pay him for it?

A. I gave him a check; I believe it was $250.00.

Q. And you were later given credit for the $250.00 on the statement of account between you people, weren't you?

A. Well, there is some difficulty on them statements there. [314]

Q. Do you have the check with you?

A. I haven't got it with me, no.

Q. The sum was for $250.00, wasn't it?

A. I believe it was. I believe it was. I am not certain.

Q. Mr. Gilbertson, you saw a paper, a statement, like this only it was white. I believe the statement, the original copy, that they had out at the place was white, was it not?

A. I believe so, yes.

Q. Now, turn over on the second page. You notice a credit for $250.00 on 11/25/44.

A. Approximately there.

Q. Yes, that is approximately the date. 11/25/44 is the approximate date—for $250.00. Now, that is the $250.00 you are talking about paying, isn't it?

A. Like I said, I am not sure what the check was. I said I believe it was about that.

Q. Now, Mr. Gilbertson, your experience as a steamfitter over the years that you were a steamfitter, had taught you something about what would equip your building, hadn't it? You knew pretty well what would equip it?

Mr. Clegg: I object to that as irrelevant and immaterial. It is a proposition, your Honor, where these parties are claiming something for the work, experience, and materials that they furnished and what Mr. Gilbertson, the witness now before the court, knew about it fifteen years ago at some unknown place is wholly immaterial and irrelevant.

The Court: Objection overruled.

Q. The years that you worked as a steamfitter had naturally qualified you to know pretty well what it would take to properly heat your building, hadn't it?

A. Well, I should know a little bit about it.

Q. Now, you saw that boiler before you bought it, didn't you? A. Yes, I did.

Q. And you saw the burner before it was put in, didn't you?

A. I didn't see it until it was laid out there. I

saw it in a box. It was the only time [315] I saw it.

Q. How long was it out to your place before it was put in?

A. Well, it was sitting there quite a few days.

Q. It set there all of the time they were setting the boiler, didn't it? A. No.

Q. Well, how many days?

A. Oh, it was perhaps, say, a week or ten days before it got put in.

Q. Now, do you remember a conversation between you and Mr. Lane about this burner before it was put in? A. Such as what?

Q. Well, did you have a conversation with Mr. Lane about this new burner?

A. All I know is we bought the burner.

Q. Didn't you talk about the burner any?

A. Not that I recall of.

Q. Now, then, you were to pay him $250.00—or, did you pay him $250.00 for that burner, didn't you?

A. I believe that was what they charged for it.

Q. Now, after it was in there awhile, that burner didn't soot anything up, did it?

A. It didn't heat the boiler.

Q. Wasn't your complaint, Mr. Gilbertson, that it had to run too much of the time, or practically all of the time, to keep the boiler hot?

A. Well, it was running practically steadily.

Q. It did keep the boiler hot when it did run practically steadily, didn't it?

A. Well, yes and no.

Q. Well, now, did you set a radiator yourself there? A. Yes, I did.

Q. Now, that wasn't set by Mr. Lane, was it?

A. No, it wasn't.

Q. Now, did you have any trouble with the radiator out there not heating, and then have a conversation with Mr. Lane about it?

A. We put the one in first, and then, after the plant was in and working, they put another unit heater in there. I don't know nothing about these unit heaters.

Q. You don't know who put the unit heaters in?

A. Lane [316] and Reed put the unit heaters in.

Q. You say when they revised the bill it was more. You do remember that the reason was that these unit heaters had been shipped up from Seattle to the depot and were taken directly from the depot to your place and used, and that wasn't in the original bills?

A. I don't know whether they were billed there or not.

Q. Will you take that bill and see if you can find those unit heaters in there, please? I am asking you, Mr. Gilbertson, about this itemized statement that you testified was changed. You have it there. Please check it and see if there is any unit heaters charged in that statement?

A. I believe that Mr. Lane and Mr. Reed brought that up and had it charged.

Q. Will you look through there and see if there is any charge to you in that whole bill for the unit heaters? A. I don't see them on there.

Q. You don't see them on there. I will ask you if on this statement, if they are not on the corrected statement, this bill being, "This cancels and supersedes all previous billings." You do find the two unit heaters in there, don't you?

A. That is not an itemized statement.

Q. Well, they are charged as $97.50 each, $195.00? A. $195.00.

They were not on that statement?

A. I believe there was something brought up about those. I am not certain what that was.

Q. You and Mr. Lane talked that over, didn't you? A. I believe it was Mr. Reed.

Q. Now, I notice that you have totaled—is that your figuring on the front: $2382.81? Is that your figures?

A. I wouldn't say, but I could tell you.

Q. You think if you added those three adding machine slips, you would get this $2382.81?

A. I am sure these are——

The Court: Just a minute. Will the witness get on the stand?

A. I am sure them are not my figures. [317]

Q. Now, will you please check the totals on the two and see if the one on your knee isn't twenty-one hundred and some dollars, the total charges out there, twenty-one hundred and some dollars?

A. Yes, but the credits are $677.48.

Q. Then what does the yellow slip show as the balance due, the little yellow slip on your leg?

A. The last?

Q. Yes.

A. According to their figures, it is $1429.76.

Q. Well that is less than the figures that you have on the ticket in your left-hand, isn't it?

A. There is no credits on these, you see.

Q. There are no credits on them. Taking the credits off, even that is less; it is about $400.00 less if you consider the unit heaters, isn't it, Mr. Gilbertson? A. No, I won't say that it is.

Q. Well, twenty-three hundred and some dollars on one and twenty-one hundred on the other, and the last one, twenty-one hundred, has the two unit heaters in it of $195.00, don't it?

A. To tell you the truth about it, the way they have it mixed up, I don't know how anybody would understand it.

Q. Are you a bookkeeper, Mr. Gilbertson?

A. No, I am not.

Q. Do you know where it says "credit" and "charges" and "balance" up at the top there, at the top of the page, where they start off?

A. We have two credits here.

Q. I mean this, starting right there. Now, you have a number of credits under the column for credits, don't you? A. I see that.

Q. Now then, the balance that that itemized statement shows is fourteen hundred and how much?

A. It says here $1429.76, according to Lane and Reed's figures.

Q. $1429.76. You had a statement like that before you when you and Mr. Lane were in a conference together, didn't you?

A. No. Mr. Reed.

Q. You first had one, you and Mr. Reed, and had these tickets?

A. Mr. Reed, not Mr. Lane, brought this out to the Ranch.

Q. You and Mr. Lane had these tickets before you?

A. No [318] he brought this statement here with him and we checked those.

Q. And you checked those tickets?

A. We checked them.

Q. There were some credits allowed on account of some error, wasn't there?

A. I could see stuff I purchased other places, at Palfy's plumbing shop, Wilburs' plumbing shop, the N. C. Company, and the Sampson Hardware, which Lane and Reed had charged out against us again.

Q. You were given credit for $60.00 that day for the return of some stuff that you had bought from Palfy?

A. Palfy, the N. C. Company, Wilbur and Sampson Hardware.

Q. And that $60.00 was agreed upon between you and Mr. Lane that day?

A. Lane and Reed just took all the fittings out there at that place and took them to town.

Q. How much was that?

A. I don't know.

Q. They took what was out there?

A. They took what was out there, what we had there ourselves.

Q. You and he agreed on an adjustment of $60.00 credit?

A. He said he would allow $60.00. I don't know what he took, but I know he got $60.00 worth.

Q. Did you agree to the $60.00?

A. I did. There was nothing else to do.

Q. All right, sir. Did you ever call Reed and Lane to come out there about anything when they didn't come?

A. Yes, I did. I called them time and time again when they were working on the job, supposedly.

Q. Did you ever call Mr. Lane and talk to Mr. Lane about this heating system not working when he didn't come to see it?

A. No, I didn't myself.

Q. You didn't yourself?

A. My brother was out there. He took care of that.

Q. Now, this burner that is charged at $100.00, and you are credited for $250.00 for the return of the new burner, was the $100.00 burner an old burner?

A. Well, they charged me for two [319] burners.

Q. You are credited with one at $250.00?

A. That one we paid for.

Q. And you are only charged on the ticket there with one burner, aren't you?

A. We are charged out with two, I believe.

Q. No, this ticket that you and Mr. Reed went over, the corrected statement?

A. This is the one he brought out to the Ranch, the copy of this one.

Q. That one charges you with only one burner at $100.00, doesn't it?

A. Yes, that's right, I believe.

Q. And it says, "as agreed." Now, that was a used burner, wasn't it? A. Yes, it was.

Q. It was an old one, wasn't it?

A. I understand it was.

Q. Now, that was a pretty good sized burner, wasn't it? It was rather large?

A. I don't know anything about oil burners.

Q. But it was larger than the small one you had in it to start with, wasn't it?

A. It looked like it was large.

Q. When it was working, it heated the boiler adequately didn't it?

A. When it did work, yes.

Q. You didn't know that was a second-hand, old burner at the time you had him take the old one out and put a new one in?

A. My brother called them up and had them bring this other burner out there, because the other one would not keep the boiler warm.

Q. Now, when did you leave out there and go to your other business in town?

A. They took over the 1st of December.

Q. The first day of December, 1944?

A. That's right.

Q. So the work done from then on, what matters that were handled out there, were handled with Harvey, isn't that right?

A. That's right, sir.

Q. All right, now, he did correct that charge, that original billing of $300.00 for this boiler? He agreed to reduce that to $175.00 on that ticket, didn't he? [320]

Mr. Clegg: I object to that as already having been testified to.

The Court: Objection sustained.

Q. Now, when you hired them to do the work out there, it was—they didn't made a contract to furnish you any particular thing or to do any particular thing? You hired them to go out there and work at so much an hour and furnish certain materials?

A. He had us charged up, to start with, on supervision, and we had that cut off.

Q. Where is that?

A. He had that on his own ticket. He had supervision charged at $3.50 an hour, if I remember right.

Q. Then you did have an agreement with him about supervision, didn't you?

A. There was no agreement. I was dealing with Mr. Lane entirely.

Q. You were dealing with Mr. Lane entirely?

A. That's right.

Q. What did you tell Mr. Lane about supervision?

A. I called him up. He was giving us, just like the Walker Construction Company give us, a little run-around out there. They agreed to do a job for $1000.00, and we ended up paying $1700.00. I told

him, "Don't go pulling a Walker Construction trick on us, because we won't agree to it."

Q. Then did you explain to him what you meant? Did you talk to him about supervision?

A. He tore those cards up; I believe he did, because he never charged us out with it after that.

Q. Mr. Gilbertson, you told him you didn't want to be charged any more with supervision?

A. We didn't feel like paying three and a half an hour for supervision.

Q. Mr. Lane, then, never charged you any more for supervision?

A. Well, he said this morning that he charged his own labor up.

Q. It was just his labor, wasn't it.

A. He charged his labor up, yes.

Q. Now, then, Mr. Gilbertson, you had someone out there keeping time, too, in the matter, did you not? A. Yes, we did [321] that.

Q. You and Mr. Lane checked those two records against each other? A. We did that.

Q. And he allowed you nine hours that your account didn't show, and he took off nine hours and gave you a credit for $27.00, didn't he, on that ticket so it would match your charge?

A. He took off $27.00 one place and $28.50 one place and $2.00 another.

Q. Now, then, when he took those off that would leave the tickets, then, credited with the hours that you had, according to your record?

A. It still doesn't correspond.

Q. Well, you had your books and his together

when those credits were made, didn't you? These tickets and your tickets were all there, weren't they?

A. He did take his own card. "Well," he said, "I won't run those through on the charge, then." That was $3.50 for supervision; I believe it was three dollars and a half.

Q. He took those off and gave you credit for them, didn't he?

A. There is a $58.00 credit here for his labor, I guess it is.

Q. Well, there is nine hours of labor, $3.00 an hour, for a mechanic, isn't it? Doesn't it show there?

A. Nine hours and one-half one place, and nine hours another place.

Q. Nine hours for a mechanic, at $3.00 an hour, $28.50? A. Nine and a half hours.

Q. Nine and a half hours? A. $28.50.

Q. That is a credit to you, isn't it, under the column of credits?

A. There is a $58.00 credit there.

Q. Then there is a $2.50 credit for a helper, one hour for a helper, two and a half?

A. Total, $58.00.

Q. Now, he consented to give you that credit because of the difference in your time-keeping and his time-keeping, didn't he?

A. Apparently he did, yes.

Mr. Belly: That is all.

Mr. Clegg: That is all.

Then Harvey Gilbertson was called and testified

in his own [322] behalf that was interested in The Ranch close to Fairbanks; that he knew Reed and Lane; that he had business dealings with them in 1944 from October or November that they were to put in a heating plant; that he worked at the ranch all the time; "We had to have a heating plant and went to them about it; they said they would put one in; they did it, but it never did work. They put in a boiler and an oil burner to heat it and some radiators and pipes. We already had those but some of them I guess they furnished, those that were shipped up here. They were what you would described as electric unit heaters. I guess they were through, but it was never working when they did get through. I found that out as soon as they started the outfit out because it was supposed to be complete but it wouldn't work.

Then this question was asked (Transcript page 90):

Q. What was wrong with it briefly?

A. I don't know. I just don't know much about it myself.

Q. You don't know much about it yourself. Well, what effect did it have on the interior of your building, if any?

A. Well, it dirtied it all up.

Q. How much and how badly?

A. Well, I don't know; just soot all over the building, all over our clothes, and all over things in the dining room and everything.

Reed and Lane were informed of the condition

they came out and adjusted it a few times, four or five times, it made it worse I believe; about the same I believe. The first one was a small burner, it didn't heat the place, the second one was larger, it didn't heat it either, and that is the one that caused all the dirt and soot.

Then this question was asked:

Q. How did that dirt and soot originate? What was the cause of that?

A. I really don't know, only when it would shut down and then start up, it would just blow off the doors, or open, rather, and then just a lot of soot would come out all over. [323]

Then the following questions and answers and proceedings were had:

Q. Was your interior perceptibly hurt?

A. Yes.

Mr. Bell: I object to that as incompetent, irrelevant, and immaterial and not within the pleadings.

Q. Just generally speaking.

The Court: Objection overruled.

Mr. Bell: Exception.

Q. Just briefly; don't go into the details.

A. Well, it just dirtied the place all up.

Q. Was it slight or trivial? A. Very bad.

Q. What? A. Very bad, yes.

Q. What did it require you to do?

A. Get a lot of help and wash it all down and clean it all up and send the clothes and everything to the laundry and cleaners.

Q. Then after you got that done, did they do anything more to it?

A. No, I didn't do that until after we got that burner out of there, because there was no use. There was nothing we could do. We took some of our things out of there.

Q. What about—did you have to take the burner out, you say? A. Yes.

Q. Then what?

A. Well, I called them several times to come and fix it, and they never did, and it didn't seem like they could, so I got to work. There was no use; I couldn't keep on going forever, so I called another oil burner man.

Q. Who?

A. Mr. Wilbur, and we had there the fellows who were working for him, and they came out.

Q. What did they do, if anything?

A. They put in a new burner.

Q. A new burner? A. Yes.

Q. How did it work after that?

A. Well, there wasn't any soot, but it just didn't make the place warm enough.

Q. It wasn't efficient in heating the place?

A. That's [324] right.

Q. What did you do after that?

A. Well, it finally winds up having to have a whole new system put in.

Q. Who did that for you?

A. Wilcox and Tommy Wilson.

Q. About when? A. This last fall.

Q. Last fall. Do you mean in December?

A. No, earlier than that.

Q. What? A. Earlier than that.

Q. Earlier than that?

A. Before the cold weather set in.

Q. Before the cold weather. Was that an efficient heating outfit?

Mr. Bell: I object to that as calling for a conclusion of the witness. He has not shown himself competent to testify as to whether it was or wasn't.

The Court: Objection sustained.

Mr. Clegg: He can tell whether he was freezing to death or not.

The Court: Objection sustained.

Q. How did the one work that Wilcox and Wilson put in? A. It works very good.

Q. Is it there now? A. Yes, sir.

Q. What did you do with the old plant, if anything? A. It is still sitting out there.

Q. Where?

A. Well, in the addition that we built to put it in.

Q. Did you do anything about notifying Reed and Lane about it? A. Yes.

Q. What?

A. Well on the burner, when we first took that out, I called them a couple times to come and get it, so they didn't; so then I went to them when I got this other system in and went to the store there and told them to come and get the boiler if they wanted it, so he said, well, he didn't want it.

Q. They didn't want it?

A. Yes. "Well," I says, "It is [325] no use to me. Somebody might be able to use it." "Well,"

he says, "we will come to take it and give you credit for it." But they never did come.

Q. It is still out there, you mean?

A. Yes.

Q. How much did you pay for that boiler? What did they charge you, I mean?

A. Well, at first it was $175.00 and then $500.00, and then back to $175.00 again.

Q. Did you at any time agree with them as to the amount to be paid for their services?

A. No.

Q. Did you, at any time, accept the work that they did out there as a finished job?

A. No, sir.

Mr. Bell: I object to that as a conclusion. The circumstances would control.

The Court: Objection overruled.

Mr. Bell: Exception.

Mr. Clegg: You claim that in your papers, in your pleadings.

Q. You never did have any agreement to that effect with either of them? A. No.

Q. Speak a little bit louder, please.

A. No, I never did agree to it that it was finished. I tried to get them to come out and fix it some way, so it would give us some heat.

Q. Was that before you finally had Wilson and Wilcox work on it? A. Yes.

Q. Who were they? What did they do?

A. Well, after they didn't come, I just had them come out and see what they could do.

Q. Who are they?

A. Well, they are two plumbers that got a shop here. I think they have a shop here. I have never been in it.

Q. Well, they are in the business——

A. Yes, sir.

Q. ——of heating? A. That's right.

Mr. Bell: I object to that. He says they were plumbers. [326]

Q. Do you know anything about what their occupation is, what they do?

A. Well, I guess they put in heating plants—plumbing.

Mr. Bell: I move to strike that he guesses. He says he guesses.

The Court: All right: It may be stricken.

Q. What did they do for you?

A. They put in a heating plant.

Q. A good or bad one? A. A good one.

Q. That is the same one you are now using?

A. Yes, sir.

Mr. Clegg: That is all.

On cross examination Harvey Gilbertson testified as follows:

Q. Mr. Gilbertson, you stated that it was put in in 1944 by Reed and Lane, didn't you?

A. Yes.

Q. And you used that up until the fall of 1945, you say? A. Well, we did, yes.

Q. Now, Harvey, did this—does this burner that you have in there now, is it the same size as the small burner that you had when Reed and Lane put it in the first time? A. I really don't know.

Q. Well, does it look about the same to you?

A. I haven't any idea, because it has been gone for quite a while. I never saw the two together.

Q. Now, do you know whether it was you or George, or who was it, had the men change the small burner for the old second-hand burner?

A. Well, I think George was the one who had most of the doings of that.

Q. Well, Harvey, you knew when they put that old burner in there that was a second-hand burner, didn't you? A. Yes.

Q. And they only charged you $100.00 for it?

A. I believe that's right.

Q. And I believe they told you if you didn't like it they would give you a $100.00 credit?

A. They agreed to put in a [327] new burner as soon as they could get one.

Q. You didn't pay them and you got in a lawsuit, isn't that right?

A. Yes, that's right. We wanted some heat. If they had fixed the heating plant, we would have paid them.

Q. They offered to take the old burner out at any time they could get one big enough—you or they, either one—and they would take it back and give you a full $100.00 credit for it?

A. That's right.

Q. And this fuss came up and you wouldn't pay them? A. No.

Q. And they got in a lawsuit and filed a lawsuit against you?

A. No, not until they wouldn't come out and do

anything about fixing the burner. Everybody else had burners.

Q. You don't know where the burner came from that the other people got, do you?

A. No, I don't.

Q. Now, you did use this one for a year?

A. Well, not quite a year.

Q. Well, you used it from—it was put in out there on October 10th or 12th, wasn't it?

A. Well, we didn't start using it until December because we were closed down for quite a while while they were putting it in.

Q. Now, this burner you got in out there now is new equipment, a full new outfit, isn't it?

A. Well, it is the same burner that Wilbur put in the old boiler. It is the same burner.

Q. It is a new burner, thought, isn't it?

A. It was, yes.

Q. What kind of a boiler do you have out there now?

A. I don't know what you would call it.

Q. Is it any larger than the old one?

A. No, it isn't as large.

Q. It isn't quite as large even, it is?

A. No.

Q. And Mr. Wilbur put that in for you?

A. No, sir.

Q. Who did put that in?

A. The boiler? Wilcox and Tommy Wilson.

Q. Is that a new boiler that is in out there now?

A. I believe it is.

Q. A new burner and new boiler?

A. The burner was used in the old boiler for awhile. I bought it from Wilbur.

Q. Do you remember what you paid for the new burner?

A. I believe the burner was—I believe it was $182.00 or $185.00.

Q. Do you know what you paid for the boiler, the new boiler?

A. Well, that was put in with the job, on this job that they did.

Q. What did they charge you for putting that in?

A. The complete job, I believe, was $1255.00, something like that.

Q. Was that boiler approximately $1000.00?

A. No, that included all of the work and everything.

Mr. Bell: That is all.

Mr. Clegg: That is all.

Mr. R. H. Heider was then called to testify for the defendant and was interrogated by Mr. Clegg; He testified that his name was R. H. Heider, was an oil burner mechanic, lived in Slaterville, 407 Minnie, lived in Fairbanks almost three years, worked for the Engineers at Ladd Field and for the Alaska Road Commission and for himself, and some work for Wilbur, oil burner work, setting up oil burners. He knew the plaintiffs in the case, knew the defendants did work for Gilbertsons while he was employed by Wilbur in the latter part of February or the 1st of March, 1945; he put in a new burner in the boiler, cemented it in and run a small

amount of cement around the base of the boiler where soot had come out and that was all. The boiler was on a small base he noticed the crack about three-eights of an inch, or one-half of an inch, he took cement and run it around the boiler to seal that crack up to keep the soot from coming out. He saw the boiler three or four times, possibly a half dozen times. He could not tell whether sealing had been placed originally on the boiler. He shortened it and narrowed it slightly approximately four inches on each face. He felt that in putting in a different burner that he needed a different size fire box so he changed it; [329] made it a little smaller to fit the tip that he had. He took the burner out that was in there, put a new one from Wilburs in and started it up (Transcript 101) "I know nothing about the boiler, only the burner. The boiler so far as I know is primarily a coal burning boiler and is was attempted to be transformed into an oil burner. It took me three hours to change it, to change the burner, and then I went back two or three times for a period of ten or fifteen minutes each time just to see how it was working. I was taken upstairs and shown what the condition was all through the house, part of the building, the living quarters and dining room, I went down and looked at the boiler and attempted to seal it against blowing further soot in case the burner did do it. It was soot from the boiler. It was the only place it could come from the boiler and the burner. The soot was on the walls, on the window sills, tables and table cloths and different furnishings. It was

sooted up you could see it. There was soot all around the place, there was no other place that I know of, no other stove that could have put it and it was thicker in the boiler room than anywhere else.

Then on cross examination he testified:

That he worked out there the latter part of February or the first of March, just replaced the burner, he had nothing to do with the boiler, no knowledge of it. Knew nothing of boilers, only burners, not a steamfitter. "I don't know anything about boilers, I am no steamfitter at all. I am a technical engineer, architects and draftsman. Don't belong to any mechanic's union. The burner I took out was an oil burner, the physical dimensions of the whole burner was larger than the new. He testified that he was an automobile mechanic.

Merele Wilcox testified on behalf of the Defendants, that he lived at 214 66th in Fairbanks, ever since 1943, was formerly employed by Reed and Lane, plumbers and heating company. He is now working for himself at 1506 Third, has a partner by the name of Tom Wilson doing business as Economy Plumbing and Heating. He knows the Plaintiffs Reed and Lane, had worked for them; knows the Defendants Gilbertsons, has known them about the same length of time he knew Reed and Lane. He worked on the Ranch job for Reed and Lane toward the last part of the job. He was supposed to be a fitter. Wilson is a plumber. He was working for Reed and Lane. he hooked up some

radiators and return lines. He examined the boiler and the boiler itself was all right so far as he knew, it was not a new boiler, it was a used one. He sealed it up, the sections of the boiler. There was a pump on the burner in poor condition, the burner wasn't in too good a shape, he just disconnected the pump and run it through without the pump. He hauled it out there in a pick-up, it was stored in the Nazarene Church.

Then these questions were asked and these answers given:

Q. At the time you put in this burner, did you think it was fit and serviceable for the job it was expected to perform.

A. Well, the burner itself wasn't what, wasn't up to snuff. That is, it wasn't like a new burner. It was an old burner, and the way I understood it—of course, I was just working there; I didn't handle any of their business, or anything—but it was a temporary set-up, so far as I know. I don't know the full details of it though (Page 108 Transcript).

Q. Do you think it was competent to perform the work that it was required to do.

A. Well, the burner was large enough to handle the job if it was working properly. The way things turned out, it just didn't work right. Once or twice—or, how many times I don't know; I wasn't there—I know it didn't operate properly at all times.

Then on cross examination he testified that it was the understanding it was to be used as a temporary

burner until a better burner could be obtained. He put the large burner in [331] there, adjusted it to the best of his ability it was an old burner at the time; the new burner was taken out before he started to work. He didn't remember who took the old burner out. The boiler so far as working right was alright. The trouble with the burner was that it was just too old. That it was just put in there for temporary use and when a better burner could be obtained it would be taken out and a new burner put in.

Tom Wilson was called and testified for the Defendants: That his business is plumbing and heating. His shop is at 1513 Third; Mr. Wilcox is a partner, the witness who just left the stand. "We are in our fourth month's business." Has recently done work out at The Ranch, put in a heating system there. Got through on or about the 16th of December. We used the unit heaters and radiators, we made a deal on the boiler, it was accepted. We put a brand new boiler in there. Personally, I am not a fitter.

Then these questions were asked and answers given (Transcript Page 112):

Q. What was the matter with the one that was in there, if anything?

Mr. Bell: We object to that as assuming a fact not in evidence, that there was anything the matter with it.

The Court: Objection overruled.

A. They claimed it wasn't heating properly.

Mr. Bell: I move to strike that; they claimed it wasn't heating properly.

The Court: It may be stricken.

Q. Don't you know generally ? You don't have to go into any great details. From your examination of the heating plant there, what was wrong with the boiler?

A. Well, personally, I am not a fitter; I don't know.

Q. You couldn't say? A. No, sir.

Q. Did you examine it?

A. I never paid any attention to it, it just was there. [332]

Q. Well, who determined to take it out?

A. The Gilbertsons.

He further testified that they wanted a system that would work; that the two of them put in the burner and the boiler; that the boiler was new; the system after put in worked good, made several trips out to verify it, everything was going along fine. Don't know the difference in capacity of the old one and the one we put in. The old one looked awful big to me. I just fixed a few leaks so far as the plumbing end was concerned. The burner we put in is using less than half of what the other one did. Four more radiators were put in.

On cross examination he testified:

We put in a hot water system. You don't have to be a steamfitter to put that in, plumbers do it. We put it in the basement of the same building. I formerly worked for Reed and Lane. I believe Mr. Lane is a good mechanic, the boiler he put in could

be used either for steam or hot water, it was about one third as big as the old boiler.

On recross examination he testified:

There are probably more sectional boilers installed by plumbers than by fitters, and so far as this boiler is concerned I would install a little bit smaller one with three men in a day. I have done that. It would depend on what kind of equipment you use as to whether or not it would take one hundred hours.

W. A. Montgomery was called and testified for the Defendant:

That he had been in Fairbanks since the 4th of April two years ago. He knew Reed and Lane, knew the Gilbertsons since the 10th of May two years ago, knows the Ranch outside of town. Has had connection with the enterprise out there. Was carpenter and bartender, and overseer at times, plumber, cement man, Jack-of-all trades, just a small amount of plumbing experience, hooking up toilets, casings, sinks and one thing or another. I have done no extensive work at it. Have met Reed and Lane several times, remembered when they worked out there. Couldn't remember the dates but they worked in November and December, 1944, putting [333] in a steam heating plant, observed the amount of time they put in from November 30, to December 5th along in there, kept track of their time, they had one or two and sometimes three men there. I think five was the most men they had there. I don't think it was over two days that they had

five men. Saw Lane off and on. His time out there varied with the different times he would come out to see about and do. Heard Mr. Reed's testimony about a rail that his firm put around the place there for dancers. Didn't see Reed do it. Stated he did it. It was just a one-half inch pipe around the band, the orchestra, a pipe railing around the band, something like this raised place here. The rail is two feet high. It is still there. So far as I knew he was the only man that worked on it.

On cross examination he testified (Transcript 121):

The pipe and fittings came from Reed and Lane plumbing shop, it was all short lengths, I think it was only two pieces of pipe that they cut. Reed and Lane furnished the fittings that went in this railing. It is a flange of some kind in the front. They furnished these flanges too. There were six galvanized floor flanges bought, but only five used. There was some three-fourths inch galvanized tees used, two and one-half inch galvanized L's used also, there were twenty-four feet of one-half inch black pipe used, this was prepared and turned over to the witness down at Reed and Lane's shop, it took about two hours to put it up. That he made a list of the time used by the men and his list and Reed's time cards, or Lane's time cards were gone over by George Gilbertson and Lane together, they said they did. He wasn't present when they went over them.

Then Jack Wilson was called and testified for the

Defendants; He testified that he lived at 704 Thirteenth, town of Fairbanks, since '43. Came from Juneau, contractor and builder, worked for Gilbertsons out at the Ranch in 1944. Had some men out there at the time, was remodeling the interior, had between four and five men, and it gradually ran down to two, was carrying on his work while Reed and Lane were installing the heating plant. Was there some of the time while they were installing the heating plant. They were not there all the time he was working. He was delayed in his work because of them not being there to put the pipe on, his job ended in December right after the first, was there later and saw the damage, Mr. Gilbertson took him to the interior and showed him how much damage was done. It was oil soot, required considerable cleaning all through the upstairs as well as the downstairs, the floors, walls, drapes, clothing and rugs and even the door knobs were covered with it.

These questions were asked and these answers given:

Q. Well, were you there at any time when the boiler exploded?

A. It didn't exactly explode, but it would blow the oil in. As I gathered it from being in and out of there, it blew the oil in, and there was a little electrical device on the front of this nozzle that ignites the oil, and, when the cold oil hits this hot fire brick, it creates a gas; and, if it isn't ignited immediately, why it will eventually cause explosions. Where there is too much of it in the air, it

just blows soot and back fires and explodes, as you call it.

Q. Were you there at any time when the doors of the boiler——

Mr. Bell: I move to strike the answer of the witness, because it is an opinion, and he is not qualified as an engineer or an expert on oil burners or this kind of work.

The Court: Objection overruled.

Mr. Bell: Exception.

And on cross examination, Mr. Wilson testified as follows:

I was mostly working for myself in 1944, that is building my own home until Mr. Gilbertson asked me to come out and remodel his place. I don't do that by contract, I did it time and material. I was employed there you might say as foreman, I was to take [335] care of the men that was there. The pipe that held them up was the one going from the main steam line through the wall into the kitchen. I cut a hole in the place so that I could put the cabinets in. It was sometime in December that Mr. Gilbertson took him upstairs and showed him the soot, they were discussing it. It was after I finished my work. I wouldn't say whether it was before or after the filing of this lawsuit.

On recross examination he testified, he was not interested in the outcome of the lawsuit.

Then Plaintiffs moved as follows:

Mr. Bell: Comes now the plaintiff and moves to strike all of the evidence with relation to the soot

or damage done to the building for two reasons: One, that it is not within the pleadings, and for the next reason that there has been no proof at all, whatsoever, of any warranty of this old second-hand burner that everyone knew was an old, second-hand burner that was put in there for a temporary use, and therefore, it was not guaranteed not to smoke; and it was evidently known that it was defective, or it wouldn't have been installed just for a temporary use until better burners could be obtained. Therefore, I move to strike all of this testimony as to the damage because it would not be binding on these plaintiffs, who didn't warrant this old burner not to smoke.

The Court: Motion denied.

Mr. Bell: Exception.

Then in rebuttal the Plaintiffs called Hillary H. Kling who testified as follows:

That he is a steam fitter, has been for 18 years, has been foreman for various companies during that time, was foreman for Siems Spokane and Drake in Kodiak for a year and a half, worked for Reed and Lane in Fairbanks, set the boiler in the place called The Ranch, is familiar with boilers, he set it to the best of his knowledge with the boiler that they had. There was no defects in the setting that he knows of; the boiler was a [336] used boiler and it would not be set like a new one. The foundation it sets on would be warped from the heat where it was previously used before, but that would not affect the boiler. It was a 26'' boiler. It would be amply large to heat the building, it came out of

the Alaska Airlines hangar at the airport. I set the boiler only, worked there for a few days erecting the boiler, helped transfer the boiler from the Reed and Lane Plumbing and Heating shop out to the Lanes with the assistance of the men that were under the employment of Mr. Gilbertson. They took it out there a section or two at a time, made two or three trips back and forth from the shop taking it out there. I cleaned it up and erected it inside the boiler room, cleaned it up and assembled it the way it should be, put headers on it and put pipe on that leading to the entrance of the building itself, the work was in a first-class workmanship manner.

On Cross examination by Mr. Clegg, he testified that he wasn't there after the boiler was fired up, never went back to work at it. Went back one time to get his overalls and jumper he had left there. Don't remember the date that he erected it. That it is the same boiler that is in dispute here that he set. The one he worked on. He worked for Siems-Drake Construction Company over at Kodiak as a steamfitter a year and a half, came from California. Siems Drake Construction work at Kodiak, been in Fairbanks since August 1943 working for himself now, at 111 Noble Street, operates a cafe called the Diner, is the owner of it. Has not abandoned his trade of steamfitting, going back with Lytle and Green as Foreman of Steamfitters when they resume work this spring for the Alaska Railroad, was employed by them last fall, also promised a job then, would have to make some other arrange-

ments to take care of the Diner. Worked out at Alaska Airlines on the boiler for Reed and Lane. He said the boiler came from there and they took it from the Alaska Airlines down to their shop and then transferred it from there out to the Ranch [337] The Court adjourned until ten o'clock a. m., Tuesday, February 5, 1946) at which time Joseph Lane was recalled and testified that he remembers Montgomery out at the place, he was a general handy man and did a little bit of everything. I had a talk with him the day I repaired the burner, he was there when the burner was repaired, that was the 24th day of December, 1944 as the tickets show.

Then the following questions were asked and answers given and the rulings of the Court were had:

Q. Now, in that conversation, what was said by you and what was said by Mr. Montgomery.

Mr. Clegg: We object to that as incompetent, irrelevant, and immaterial and not rebuttal.

The Court: There was no foundation laid for an impeachment either, was there?

Mr. Clegg: No sir.

The Court: Objection sustained.

Mr. Bell: Exception.

Q. Mr. Lane, did you testify in chief as to what you did that day out there. A. Yes.

Q. Now, did you talk to Mr. Montgomery and show him what you did? A. Yes.

Mr. Clegg: We object to that as immaterial and irrelevant and not binding on the defendants.

The Court: Well it has been answered.

Q. Mr. Lane, in that conversation did he tell you that he had taken that electrode out two or three times and worked on it himself?

Mr. Clegg: We object to that, if the Court please, as no foundation has been laid for the question. It isn't rebuttal testimony, and it is not binding on the defendants. [338]

The Court: Objection sustained.

Mr. Bell: Exception. Your Honor, may I make an offer then? I offer to prove by this witness, if he was permitted to testify, that he had a conversation with Mr. Montgomery, who was a regular employee of the defendant in this action, and that in this conversation Mr. Montgomery told him that he had taken this electrode out and worked on it two or three times, and then when Mr. Lane examined it, it was broken—the electrode was broken—and that he repaired it; that he did not have a new electrode to substitute or replace this one, and he repaired it so that it worked good at the time and placed it back, and it worked all right at the time. I offer to prove that.

Mr. Clegg: To which we make the same objection as before.

The Court: Objection sustained, exception allowed Plaintiff.

Q. Mr. Lane, you heard Mr. Gilbertson testify that there was plenty of burners in the Town of Fairbanks at that time. Is that true?

A. Not to my knowledge it isn't.

Q. Well, were you able to get any burners at that time other than what you furnished him.

A. No.

Q. Now did Mr. Gilbertson know that this was an old burner at the time you let him have it?

A. Yes.

Q. What was your conversation with Mr. Gilbertson with reference to taking out the new burner that was in the boiler, under the boiler, and placing in the old burner that was larger?

Mr. Clegg: Just a minute. We object to that as leading and suggestive, incompetent, irrelevant, and immaterial, and not rebuttal.

The Court: Now is that rebuttal, Mr. Bell?

Mr. Bell: Mr. Gilbertson testified to what that conversation was, and this gentleman has a different version of what [339] the conversation was, and that he explained to him at the time that it was old and that he would let him have it, if it could work all right, until they could get another burner, and then, if they could get a new burner as large as Mr. Gilbertson wanted anywhere, they would take it back, allowing him the same $100.00 for it that they charged him for it.

The Court: Objection sustained.

Mr. Bell: Exception. I offer to prove at this time by this witness, if permitted to testify that when he talked to Gilbertson about taking out the new burner that it was working all right at the time, but Mr. Gilbertson thought it was consuming too much oil because it burned too much of the time to keep the boiler hot and wanted a larger

burner, and that this witness told Mr. Gilbertson at the time that he had an old burner that he could have for $100.00, and he would take the new burner out and give him credit for the full $250.00, the amount he had charged him for the new burner, and then if he could, if Mr. Gilbertson could get a larger burner, any better burner, that Reed and Lane would take the old burner and give Mr. Gilbertson full credit for the $100.00 and would install the new burner for him at the regular and customary charges per hour for doing the work.

Mr. Clegg: To which we object, if the court please, upon all the grounds heretofore stated and especially on the ground that it isn't rebuttal testimony, and no foundation has been laid for this question, or series of questions.

The Court: Objection sustained, exception allowed Plaintiff.

He then testified that he lent the people an oil burner space heating to use during the time the work was being done and charged them nothing for it because of the fact that material wasn't available at the time and hard to get so in order to keep him going until we were able to get his heating system in why we lent him this burner. Mr. Gilbertson had his own radiators; Reed [340] and Lane furnished unit heaters was all. They were taken from the depot here directly from the depot out to Gilbertson's Ranch. They were not in the original bill as submitted to Mr. Gilbertson, they were overlooked, they were eventually billed at $195.00 for the

two heaters that had been left out of the original bill to Mr. Gilbertson.

Then these questions were asked and these answers given and the rulings of the Court as follows:

Q. Mr. Lane, what was the occasion of your going out to the Ranch on the 24th of December, 1944?

Mr. Clegg: We object to that on the ground it is mere repetition. It has already been well covered by Mr. Reed.

The Court: Objection sustained.

Q. May I ask the question this way: Were you called by a member—were you called by Harvey Gilbertson or George Gilbertson to go out there that day?

Mr. Clegg: We object to that on the ground that it has been already answered, and it makes no difference which of the defendants did call the Reed and Lane shop.

The Court: Objection sustained.

Mr. Bell: Exception. You may take the witness.

Mr. Clegg: No questions.

Mr. Bell: We rest.

Mr. Clegg: If your Honor please, at this time we would like the privilege of renewing our motion at the close of the main case of the Plaintiffs for non-suit on the grounds stated at that time, and on the further ground that the testimony of the plaintiffs clearly show that the so-called lien statement, this lien statement in this case, was not filed in due time, and was filed after the expiration of ninety days from the cessation of work and furnishing of

materials as alleged in the complaint, and it is, therefore, void; and there is no basis whatsoever upon which a judgment for the plaintiffs might be given to establish this lien, or alleged lien.

The Court: Motion denied.

That thereafter and on the 21st day of February, 1946, Plaintiffs filed their amended motion for a new trial, which is in words and figures as follows, to-wit:

"In the District Court for the Territory of Alaska,
Fourth Judicial Division.

No. 5288

JOSEPH LANE, HENRY REED and STANLEY SMITH, partners doing business under the firm name and style of REED and LANE, plumbers, heaters and sheet metal,

Plaintiffs,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as THE RANCH and the First National Bank of Fairbanks, Alaska.

Defendants.

AMENDED MOTION FOR A NEW TRIAL

Comes now the plaintiffs in the above-entitled cause, and moves the Court to set aside the judgment, findings and decision rendered herein on the 18th day of February, 1946, and to grant a new trial for the following reasons, which materially affect the rights of these plaintiffs.

1.

That the Court erred in sutaining the defendants objections to competent questions, thereby preventing the introduction of competent evidence.

2.

That the Court erred in sustaining objections to identification and exhibits offered on behalf of the plaintiffs which were competent, material and relevent, and should have been admitted in evidence.

3.

That the Court erred in refusing the numerous offers to prove competent, material and relevant evidence.

4.

That the Court erred in sustaining objections to the offers in evidence of the invoice issued by the plaintiffs, the original of which were delivered to the defendants and the exact carbon copy kept by the plaintiffs as a part of their regular bookkeeping record of the account sued on herein.

5.

That the Court erred in sustaining objections to the introduction in evidence of the original time cards; same being the original and first entry of record of the account sued for herein, and being a part of the bookkeeping system used by the [343] plaintiffs in their place of business at Fairbanks, Alaska, affecting the account sued for herein.

6.

The Court erred in sustaining defendants objections to questions which were competent, material

and relevant, and thereby prevented these plaintiffs from making part of their proof of the allegations in the complaint.

7.

The Court erred in finding that the plaintiffs and defendants entered into an oral agreement whereby plaintiffs agreed to furnish an adequate first-class heating system for defendants' building, known as "The Ranch," for the reason that there were no competent evidence to base such findings on, and was contrary to the great weight of the evidence.

8.

That the Court erred in finding that the plaintiffs did install an alleged heating system in said building; that the same was not adequate to heat the said building and was not a first-class job, but, in fact, was not of any reasonable value whatsoever, except the two unit radiators therein which were of the reasonable value of $195.00.

9.

The Court further erred in finding that defendants detached from said building and premises and refused to keep the same the boiler and oil burner which plaintiffs had installed herein as a part of said heating system and charged defendants tendered said boiler and burner, as personal property, back to plaintiffs, and the same is now their property. That such finding is not based upon sufficient competent evidence and is against the great weight thereof.

10.

The Court further erred in finding that the plaintiff's lien claim in this action, having been filed for record upon the 21st day of March, 1945, was filed more than 90 days after the last work or last material was furnished under said contracts and, [344] therefore, was filed after the time allowed by law for filing such a lien claim.

11.

The Court further erred in finding that upon the 24th day of December, 1944, the plaintiffs made a service call to adjust or repair the oil burner at said Ranch and made a charge of $3.00 therefor; that the same was not pursuant to the above-mentioned contracts or either of them and formed no part of the performance of either of said contracts, and no lien claim was filed for said $3.00 charge; that said finding was contrary to the great weight of the evidence and not based upon sufficient competent evidence.

12.

The Court further erred in the conclusions of law, number 1, to-wit: The plaintiffs have no lien upon said Ranch or premises.

13.

That the Court erred in conclusion of law number 2, to-wit: That the defendants have paid in full all sums owing the plaintiffs upon said contracts.

14.

The Court erred in conclusion of law number 3,

to-wit: That said boiler and oil burner which were detached from said heating system are the property of the plaintiffs.

15.

That the Court erred in the conclusion of law number 4, to-wit: That the defendants are entitled to recover their costs and disbursements in this action.

16.

The Court erred in denying the plaintiffs any recovery herein for the reason that there were no competent evidence upon which the Court could base such findings and conclusions of law set forth, and to said findings of facts were against the clear weight of the evidence and against the law controlling in this case.

17.

Plaintiffs therefor move that the Court grant a new trial in the above-entitled cause.

BAILEY E. BELL,
Attorney for Plaintiff."

And the Plaintiffs allege that the Court erred in overruling the above amended motion for a new trial which order overruling said motion for a new trial was made and entered in said cause on the 15th day of March, 1946.

Thereafter and on the 25th day of March, 1946, a Notice of Appeal was duly served on opposing counsel and filed in said cause, which notice of appeal is in words and figures as follows: to-wit:

"In the District Court for the Territory of Alaska,
Fourth Judicial Division.

No. 5288

JOSEPH LANE, HENRY E. REED and STANLEY SMITH, partners doing business under the firm name and style of REED and LANE, plumbers, heaters, sheet metal,

Plaintiffs,

vs.

GEORGE GILBERTSON and HARVEY GILBERTSON, joint owners and partners doing business as THE RANCH and The First National Bank of Fairbanks, Alaska,

Defendants.

NOTICE OF APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES OF AMERICA

Notice is hereby given that Joseph Lane and Henry Reed, the sole owners and doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, the Plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit of the United States of America, from the final judgment entered in the above entitled action, and from the order overruling their motion for a new trial entered in this action on the 15th day of March, 1946, and as grounds of appeal allege that the Court erred as follows:

I.

The Court erred in overruling plaintiffs objec-

tions to questions which permitted evidence to be introduced that was incompetent, irrelevant, immaterial and prejudicial.

II.

The Court erred in sustaining objections to plaintiffs questions that were competent, relevant and material, thereby preventing plaintiffs from making proof that was admissable.

III.

The Court erred in refusing plaintiffs [347] offers to prove competent material and relevant matters.

IV.

That the judgment and findings of facts are contrary to the evidence; contrary to the law effecting this case, and against the clear weight of the evidence and the Court erred therein.

V.

The Court erred in overruling the motion for a new trial filed herein.

VI.

Errors of law occurring at the trial on the part of the Court, and excepted to by plaintiffs.

VII.

The Court erred in excluding certain identifications offered in evidence.

BAILEY E. BELL,
Attorney for Plaintiff."

That thereafter and on the 25th day of March, 1946, the Court Clerk filed herein his affidavit of mailing copies of the above notice, which affidavit is set up in full in the transcript and made a part of this Bill of Exceptions by reference as fully as if set out herein.

Thereafter and on the 28th day of March, 1946, a certified copy of the transcript showing proceedings had in open Court was filed in this cause and is set up in the trancript and is hereby made a part of this Bill of Exceptions by reference; thereafter and on the 5th day of April, 1946, the Plaintiffs filed their petition for allowance of appeal which was approved by the Court and the appeal allowed, and shown in the transcript and made a part of this bill of exceptions by reference as fully as if set out herein.

On the 5th day of April, 1946, Plaintiffs filed assignments of errors which are a part of the transcript herein and made a part of this bill of exceptions by reference.

On the 5th day of April, 1946, Citation was [348] issued by the Court and filed in said cause and is set out in full in the transcript and made a part of this Bill of Exceptions by reference. That on the ..... day of ....., 1946, appeal bond was duly filed and approved by the Court, a copy of which is set up in the transcript.

That rules Numbers 42 and 60 of the rules of the District Court of the Territory of Alaska, Fourth Division are as follows:

RULE 42. EXCEPTIONS IN CIVIL CASES

Whereas the laws of Alaska relative to civil procedure provide:

(a) Section 3639, Compiled Laws of Alaska, 1933: "No exception need be taken or allowed in any decision upon a matter of Law when the same is entered in the journal or made wholly upon matters in writing and on file in the Court."

(b) Section 3637, Compiled Laws of Alaska, 1933: "The verdict of the jury, or any decision, partially or finally determining the rights of the parties, or any of them, or affecting the pleadings, or granting or refusing a continuance, or granting or refusing a new trial, or admitting or rejecting the evidence, provided objection be made of its admission or rejection at the time of its offer, or made upon ex parte application or in the absence of a part, are deemed excepted to without the exception being taken or stated or entered in the journal."

It shall not be necessary for counsel to take exceptions in such case but, if they so wish, they may, in making up a bill of exceptions for this case, show that the exception was duly taken.

RULE 60. END OF TERM

(a) The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of Court. The expiration of a term of Court in no way affects the power of this Court to do any act or take any proceedings in any civil or original action which has been pending before it.

(b) Any and all undisposed of matters of any nature, pending in this Court at the termination of any term, shall be continued over to the next term, and the situation respecting the same shall [349] in making up a bill of exceptions for the same, show in no wise be affected by the termination of any term or terms.

That the Judgment of the Court overruling the motion for a new trial is in the words and figures as follows, to-wit: No. 5288. Joseph Lane, et al, Plaintiffs, versus George Gilbertson, et al, Defendants.

This being the time set for the argument on the motion for a new trial in this cause, Cecil H. Clegg, Counsel for defendants being present, and Bailey E. Bell, Counsel for the plaintiffs not being present, and the Court having considered the Plaintiff's motion for a new trial, and being fully advised in the premises, it was ordered that the motion be denied.

HARRY E. PRATT,
District Judge.

Entered in Court Journal No. 33, page 299, dated March 15, 1946.

Plaintiff respectfully contend that the Court erred in the proceedings herein where each objection was stated by the Plaintiffs and each adverse ruling of the Court therein, and prays a reversal of the judgment in the above-entitled cause, and

that a proper judgment be rendered therein based upon the pleadings, evidence and rulings therein.

BAILEY E. BELL,
Attorney for Plaintiff.

(Acknowledgment of Service.)

CERTIFICATE

The within and foregoing Bill of Exceptions, together with the exhibits thereto attached is hereby settled and allowed and is approved and certified as a correct record of the evidence produced at the trial of the case and a correct statement of such proceedings, pleadings, ruling and exceptions in said cause during the trial and both prior and subsequent thereto as are deemed necessary by the respective parties to present clearly the matters for review as to which exceptions are reserved, and as are not included in the primary record herein.

It Is Further Certified, that such bill was settled and allowed during the judgment-term or proper extensions thereof, and within the time allowed by the Court, for the settlement thereof.

Given under my hand this 20th day of June, 1946.

HARRY E. PRATT,
District Judge.

[Endorsed]: Filed April 15, 1946.

[Endorsed]: Filed June 20, 1946.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby stipulated and agreed between the above-named plaintiffs and the defendants, George Gilbertson and Harvey Gilbertson, through their attorneys of record, that the time within which said defendants may file herein their objections and proposed amendments to plaintiffs' proposed Bill of Exceptions may be extended to and including May 24, 1946.

Dated at Fairbanks, Alaska, this 7th day of May, 1946.

WARREN A. TAYLOR,
Of Attorneys for Plaintiffs.

CECIL H. CLEGG,
Attorney for Defendants,
Gilbertson.

[Endorsed]: Filed May 7, 1946. [352]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE

It Is Hereby ordered, that the time within which the record on appeal in this case shall be deposited and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth District at San Francisco, California, and said cause docketed

therein, be and it is hereby enlarged to the 20th day of July, 1946.

Dated at Fairbanks, Alaska, this 24th day of June, 1946.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal No. 34, Page 78, June 25, 1946.

[Endorsed]: Filed June 25, 1946. [353].

[Tile of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, John B. Hall, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of 353 pages, constitutes a full, true, and correct transcript of the record on appeal in Cause No. 5288, entitled: Joseph Lane, Henry E. Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters, and sheet metal, Plaintiffs, versus, George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch and the First National Bank of Fairbanks, Alaska, Defendants, and was made pursuant to and in accordance with the Praecipe of the Plaintiffs and Appellants, filed in this action, and by virtue of the said Appeal and Citation issued in said cause, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof, consisting of pages "a" and "b", is a correct index of said Transcript of Record, and that the list of attorneys, as shown on page "c", is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to $42.85 has been paid to me by counsel for the appellants in this action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 10th day of July, 1946.

(Seal) JOHN B. HALL,
Clerk.

[Endorsed]: No. 11384. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Lane, Henry E. Reed and Stanley Smith, partners doing business under the firm name and style of Reed and Lane, plumbers, heaters and sheet metal, Appellants, vs. George Gilbertson and Harvey Gilbertson, joint owners and partners doing business as The Ranch, and the First National Bank of Fairbanks, Alaska, Appellees. Transcript of Record. Upon Appeal from the District Court, Territory of Alaska, Fourth Division.

Filed July 13, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11384

JOSEPH LANE, et al.,

Appellants,

vs.

GEORGE GILBERTSON, et al.,

Appellees.

ORDER THAT EXHIBITS NEED NOT BE PRINTED IN TRANSCRIPT OF RECORD

Good cause therefor appearing, It Is Ordered that the exhibits included within the certified typewritten transcript of record in above cause need not be printed, but will be considered by the Court in their original form.

It Is Further Ordered that the originals of such exhibits, retained by the clerk of the District Court, are to be forwarded to the clerk of this Court for filing and for use upon the appeal, to be returned by the clerk of this Court to the District Court upon conclusion of the appeal.

/s/ FRANCIS A. GARRECHT,
Senior United States Circuit Judge.

Dated: San Francisco, California, August 5, 1946.

[Endorsed]: Filed Aug. 6, 1946, Paul P. O'Brien, Clerk.